No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1998

MAXINE B. COUSIN, LORENZO E. ERVIN, JR., EZRA B. HARRIS, JOHNNY D. HOLLOWAY, GEORGE A. KEY, SR., BUFORD MCELRATH, ANNIE D. THOMAS, BOBBY WARD, and ELLA BRYANT,

Petitioners,

v.

DON SUNDQUIST, Governor of Tennessee; STATE ELECTION COMMISSION; BROOK THOMPSON, Coordinator of Elections; HAMILTON COUNTY ELECTION COMMISSION; and CAROLYN JACKSON, Superintendent of Elections of Hamilton County,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the court of appeals erred in ruling that single-member districts could not be used as a remedy for countywide judicial elections even where such elections violate Section 2 of the Voting Rights Act, 42 U.S.C. § 1973?

2. Whether the court of appeals erred in ruling that Section 2 precluded the use of a non-district based remedy, *i.e.*, cumulative voting, for countywide judicial elections even where such elections violate the Voting Rights Act?

3. Whether the court of appeals erred in placing dispositive reliance on white/white contests in concluding that blacks were able to elect candidates of their choice in countywide judicial elections?

4. Whether the lower court erred in its totality of circumstances analysis under Section 2?

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The opinion of the court of appeals is reported at 145 F.3d 818 (6th Cir. 1998), and is included in the appendix hereto at App. 1. The July 10, 1998 order of the court of appeals denying petitioners' suggestion for rehearing *en banc* and petition for rehearing is unreported and is included at App. 121. The opinion of the district court is reported at 904 F.Supp. 686 (E.D.Tenn. 1995), and is included at App. 39. The opinion of the district court implementing a court ordered remedy is unreported and is included at App. 103.

JURISDICTION

The court of appeals entered its judgment on June 1, 1998. Petitioners filed a timely suggestion for rehearing *en banc* and a petition for rehearing pursuant to Sixth Cir. Rule 14(a) which was denied on July 10, 1998. This petition for writ of certiorari is being filed in this Court within 90 days after denial of the petition for rehearing by the court of appeals. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory provision involved in this case is Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, the text of which is included at App. 122.

STATEMENT OF THE CASE

Petitioners are black residents and voters of Hamilton County, Tennessee. They contend that the circuit, or countywide, method of electing judges in Hamilton County dilutes black voting strength in violation of Section 2 of the Voting Rights Act, 42 U.S.C. § 1973. Blacks

are 19.1% of the total population and 17.2% of the voting age population (VAP) of Hamilton County. App. 42-3. The largest concentration of black population is in Chattanooga, the county seat, where blacks are 33.7% of the total population. *Id.* The defendants include state and local officials who are responsible for conducting the challenged elections.

The judiciary in Hamilton County consists of the circuit court (4 members or divisions), the criminal court (3 members or divisions), the chancery court (2 members or divisions), and the general sessions court (5 members). Terms of office are for eight years, a designated post requirement is in effect, and elections are partisan, except elections for the two general sessions court judgeships added in 1996 which are non-partisan. App. 2-3; H.B. No. 3273, Private Chapter No. 192 (1996). All judicial elections are conducted countywide.

A. ***The Decision of the District Court.*** Following a trial and an appeal and remand for further fact finding,[1] the district court held on September 28, 1995 that at-large judicial elections diluted black voting strength in violation of Section 2. App. 100-01. The court applied the three-part and totality of circumstances analysis provided for in *Thornburg v. Gingles*, 478 U.S. 30, 50-1 (1986), and *Johnson v. De Grandy*, 512 U.S. 997, 1011 (1994).

In applying the first, or geographic compactness, prong of *Gingles*, 478 U.S. at 50, the district court held

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[1] In Cousin v. McWherter, 840 F.Supp. 1210, 1220-21 (E.D.Tenn. 1994), the district court first held that circuitwide elections for judges in Hamilton County violated Section 2. On appeal, the court of appeals vacated and remanded for "specific findings of fact and conclusions of law," but "emphasize[d] that we do not express any opinion about the merits of the Plaintiffs' claims." Cousin v. McWherter, 46 F.3d 568, 577 (6th Cir. 1995).

that "the population of blacks in Hamilton County is sufficiently large and geographically compact so that blacks would constitute a majority in one or more single member districts." App. 42.[2] As for the second, or political cohesion, prong of *Gingles*, 478 U.S. at 51, the district court found that "blacks in Hamilton County are politically cohesive in that they tend to vote as a bloc." App. 48. In their brief on appeal, defendants conceded that "African-American voters in Hamilton County vote cohesively for judicial candidates," and "that the plaintiffs have met the second precondition" of *Gingles*. No. 96-6028, Brief of Appellants, pp. 8-9, 33 (hereinafter Brief of Appellants).

The district court based its finding of cohesion in part on the analysis of plaintiffs' expert Dr. Steven Cole, who used the "standard" techniques of ecological regression and homogeneous precinct analysis approved in *Gingles*, 478 U.S. at 53 n.20. Dr. Cole analyzed 26 local, county, state, and national black/white contests from 1966-1993 using regression analysis. The average rate of black cohesion was 79%, and the average level of white crossover voting was 12%. App. 83. The district court also took judicial notice of the court's findings of racial bloc voting in *Brown v. Board of Commissioners of Chattanooga, Tenn.*, 722 F.Supp. 380 (E.D.Tenn. 1989), which invalidated at-large elections in Chattanooga under Section 2. App. 69-76. In *Brown*, the court found that "[i]t is . . . clear that black and white voters in Chattanooga do vote differently most of the time." 722 F.Supp. at 393.

The district court also found that plaintiffs proved the third *Gingles* factor, 478 U.S. at 51, *i.e.*, "the white

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[2] Plaintiffs' district plans for the circuit, criminal, and general sessions courts are set out at App. 43-4, 46-7.

majority votes sufficiently as a bloc to usually enable it to defeat the minority's preferred candidate." App. 48. The finding of the district court was similar to that in *Brown*, 722 F.Supp. at 396, which held that "candidates favored by blacks are usually defeated by whites voting as a bloc in Chattanooga."

The only black/white judicial contest in which all residents of the county voted was the 1980 partisan election for Supreme Court of Tennessee. Brown, the black incumbent, had been appointed by the governor to fill an unexpired term. Brown got 77% of the black vote but was defeated with whites giving 70% of their votes to his two white opponents. App. 76-84.

There have been four black/white municipal judicial elections in Chattanooga, two of which were won by blacks, Bennie Harris in 1969 and Walter Williams in 1991. App. 49. Harris, a former city prosecutor, was the incumbent having been appointed city judge to fill an unexpired term. Although voting was polarized (Harris got 96% of the black vote, and his opponent got 69% of the white vote), black turnout was exceptionally high (30% for blacks compared to 15% for whites) and Harris won. App. 93. Had he not been the incumbent, Harris would not have run because of lack of support "amongst the white population" of Chattanooga. Harris, Trial Transcript, Volume II, pp. 62-3 (hereinafter "T. Vol.").

Williams ran for an open seat, with the city judgeship being the only contest on the ballot. Williams, T. Vol. II, p. 9. White turnout was only 8%, while black turnout was 19%. Trial Ex. 313, p. 22. Voting was almost entirely on racial lines; Williams got 100% of the black vote, while his white opponent got 87% of the white vote. App. 93-4; Trial Exs. 371, para. 56; 372, para. 56.

Taking the black/white judicial contests as a whole, the district court found that:

> the level of white crossover voting in judicial elections has been steadily *declining* over time. In the 1969 contest for city judge the black candidate got 30.7% of the white vote. In the 1980 contest for state Supreme Court the black candidate, an incumbent who had been appointed by the governor to fill an unexpired term, got 30.4% of the white vote. In the 1982 contest for city judge the two black candidates got a combined white vote of just 23.5%. In the 1991 contest for city judge the black candidate got only 13% of the white vote.

App. 82-3. The court concluded that "[b]ased upon the most recent voting patterns the level of racial bloc voting is increasing in Hamilton County making it more difficult than ever for a black to win a county-wide judicial office." App. 83.

Blacks have run for countywide office on a number of occasions, but with the sole exception of Ardena Garth in 1990, none has been elected. App. 93-4. The following chart shows the office voted on countywide, the black candidates, whether the black candidate was preferred by black voters, and whether the black candidate won or lost.

Countywide Black-White Elections

Office	Black Candidates	Preferred	Result
1966 Cty. Coun.	Mapp	yes	lost
1968 Trustee	Mapp	Unk[3]	lost
1974 Dem. Prim. Cty.			
Coun.	Green	yes	lost
Registrar	Mapp	yes	lost
1978 Dem. Pri.			
Cty. Coun.	Mapp	yes	lost
	Cotton	yes	lost
	Moore	yes	lost
1980 Sup. Ct.	Brown	yes	lost
1990 Dem. Pri. Public			
Defender	Garth	yes	won
Juv. Ct. Cl.	Swafford	yes	lost
1990 Gen. El. Public			
Defender	Garth	yes	won

App. 93-5; Trial Ex. 313, pp. 1-4.[4]

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[3] There were four white candidates in the election. Dr. Cole concluded that the election could only be analyzed effectively by homogeneous precinct analysis, and that Mapp received an estimated 38% of the black vote and 1% of the white vote. Trial Exs. 313, p. 4; 316; Cole, T. Vol. I, pp. 118-19. Mapp may have received a plurality of the black votes and have been the preferred candidate of blacks, but given the available analysis it is not possible to make that determination.

[4] There were two state black/white contests in which all residents of the county voted, the 1984 and 1988 Democratic Presidential Preference Primaries. There were six candidates in the 1984 primary, Jesse Jackson (black) and five whites. Jackson

Garth was initially appointed public defender by the governor. The office of public defender of Hamilton County was newly created and Garth was the first and only person to hold it. She ran as an incumbent but failed to receive a majority of white votes in either the primary or general election. App. 95. The district court found that Garth's election was an exception and "not a reliable measure of racial bloc voting." App. 68, 94-5. Defendants conceded that in most "elections involving black/white candidates, the black preferred candidate is usually defeated by the white voting bloc." Brief of Appellants, p. 35.

The district court held that based upon the "totality of circumstances" the challenged at-large method of elections "results in a substantial abridgment of the right of the minority to vote." App. 101. The court found an extensive history of discrimination in the state and in Hamilton County that touched the right of blacks to vote and participate in the political process. App. 79-80.

The district court found, and the parties stipulated to, significant recent examples of public and private discrimination. They included: routine segregation in virtually all aspects of life well into the 1960s; past and continuing *de jure* and *de facto* segregation in public housing, public schools,[5] law enforcement, employment,

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got 92% of the black vote, and 3% of the white vote. White turnout was extremely low (4%) and Jackson got a plurality (44%) of the votes cast. Trial Exs. 313, p. 9; 337. There were eight candidates in the 1988 primary, Jackson and seven whites. Jackson got 96% of the black vote, and 0% of the white vote. He came in second to Al Gore with 35% of the votes cast. Trial Exs. 313, p. 10; 341.

[5] As late as 1968 a federal court found the continuing existence of *de jure* segregation in Tennessee higher education. Sanders v. Ellington, 288 F.Supp. 937, 942 (M.D.Tenn. 1968);

health care, social services; and, violence directed at blacks.[6] App. 708-10; Trial Exs. 371; 372.

The district court found that Hamilton County has used election practices that enhanced the opportunity for discrimination against blacks, *i.e.*, at-large elections for the city board of education and city commission of Chattanooga. App. 84-6. There is also a designated post requirement in all judicial elections which enhances the discriminatory effect of at-large voting. *See Rogers v. Lodge*, 458 U.S. 613, 627 (1982) ("the requirement that candidates run for specific seats . . . enhances appellee's lack of access because it prevents a cohesive political group from concentrating on a single candidate").

The district court found that "[b]lacks in Hamilton County, as a result of past and continuing discrimination

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Geier v. Alexander, 593 F.Supp. 1263, 1265 (M.D.Tenn. 1984). In 1984, in an effort to eliminate the continuing effects of the dual system, the district court approved a consent agreement that, among other things, was designed to increase the number of blacks in law and other professional schools. Geier v. Alexander, 593 F.Supp. at 1267.

[6] In April, 1980 three members of the Ku Klux Klan burned wooden crosses near Ninth Street, a predominantly black neighborhood in Chattanooga. Afterwards, the Klansmen drove down Ninth Street and shot four elderly black women who were standing on the sidewalk. The Klansmen then proceeded further down Ninth Street and shot into a parked car. Shattered glass from the car struck and injured a fifth black woman who was watering flowers in her yard. Trial Exs. 371, para. 153; 372, para. 153. The Klansmen were tried in state court for assault and were acquitted by an all white jury. Trial Exs. 371, para. 154; 372, para. 154. The five black victims later filed suit in federal district court, and received a favorable verdict from the jury. Trial Exs. 371, para. 155; 372, para. 155, 242-43; Crumsey v. The Justice Knights of the Ku Klux Klan, CIV-1-80-287 (E.D.Tenn. March 1, 1982).

in education, employment, and other areas, have been isolated from the economic and political main stream . . . [and] remain a socioeconomically depressed minority with a limited ability to fund and mount political campaigns." App. 92. Few blacks have been elected to office. App. 93-4.

No black has ever been appointed to a county judgeship, although appointment to the bench is common. Williams, T. Vol. II, p. 10. Of the present nine judges of the Eleventh Judicial Circuit, five were initially appointed to office. Trial Ex. 365, p. 2. A sixth was appointed city judge in 1977, and then ran countywide in 1982 as an incumbent judge. Meyer, T. Vol. III, p. 122. It is a substantial advantage to be appointed to a judgeship and run as an incumbent, if for no other reason than incumbent judges rarely have opposition. Williams, T. Vol. II, p. 10; Garth, T. Vol. III, p. 38; Barker, T. Vol. II, pp. 122, 151.

Given the depressed socioeconomic status of minorities, and the high level of bloc voting by whites, there have been proportionately fewer black than white candidates for at-large offices in Hamilton County. Qualified blacks, such as Judge Williams, have considered running for countywide judgeship but decided against it. Williams did not feel "that the votes were there sufficiently to do it." Williams, T. Vol. II, p. 7. Black lawyers in Hamilton County have frequently met and discussed the possibility of running for a countywide judgeship, but "[w]hen you looked at the numbers, they just were not there." Williams, T. Vol. II, p. 52. Ardena Garth also said "there were desires to run in certain places, but those desires were never ever carried out." Garth, T. Vol. III, p. 10. "It's going to be very difficult for blacks to be elected on a countywide basis to a judgeship." *Id.* at 60.

The 1993 contest for mayor of Chattanooga was highly racially polarized. Littlefield, who is white, got 98% of the black vote but only 10% of the white vote and was defeated by the white incumbent. Trial Ex. 313, p. 13. Littlefield's campaign strategist remarked after the election that racial intolerance had particularly hurt his candidate. "One thing that really stuck out in my mind here: This is really a racist town. . . . When I was calling around trying to raise money for the campaign, I actually had people tell me they wouldn't give Littlefield any money, because they said, 'He's an N-word lover.' " Trial Ex. 364.

Garth's opponent in the 1990 general election adopted a strategy of informing white voters that she was black. On election day he handed out leaflets at predominantly white precincts containing a photograph of Garth "that had been cropped out of a group photo from a newspaper article, and the picture had been darkened to the point where you couldn't really see anything but my eyes in the picture." Garth, T. Vol. III, p. 41. At the East Ridge polling place on election day, campaign workers for her opponent advised prospective voters that Garth was black. Garth, T. Vol. III, p. 40.

The district court concluded:

> The Court has also observed in the courtroom the presence of the African-American plaintiffs and African-Americans who have run for public office in Hamilton County, knowing they had no chance to win, fighting hard to participate in the political process in Hamilton County in a meaningful way, trying to change the system so that they would have a reasonable expectation of being allowed to have some opportunity of success in elections. From all the above, the Court

> strongly FINDS that the plaintiffs in this case are justly entitled to the redress sought.

App. 102.[7]

The district court provided the general assembly of Tennessee an opportunity to enact a remedy for the Section 2 violation but it failed to do so. App. 5. Defendants advised the court that they would take "no position" as to the remedy the court should impose. *Id.* During the course of the litigation plaintiffs suggested a number of alternative remedies for adoption by the court, including single member districts and limited or cumulative voting. District Court Record 69 (hereinafter "R") (plaintiffs' memorandum of law as to remedy); R. 103 (plaintiffs' additional memorandum of law as to remedy).

On July 10, 1996 the district court ordered a remedy providing for the continued at-large election of judges of

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[7] The opinion that voting is polarized and that blacks do not have an equal opportunity to elect candidates of their choice at-large is shared, not simply by the two district court judges in *Cousin* and *Brown*, but by experienced local politicians as well. In 1988, after the complaint was filed in *Brown*, the city appointed a charter commission to propose a new form of government and method of elections for Chattanooga. Trial Exs. 371, para. 197; 372, para. 197. The commission recommended a mayor/council form of government elected from single member districts. The majority opposed at-large voting because it would dilute black voting strength. Trial Exs. 371, para. 198; 372, para. 198. Five white members of the commission issued a minority report. They agreed that voting was polarized but favored a combination of at-large and district voting as necessary to give whites who lived in majority black districts and blacks who lived in majority white districts a chance to be elected to city office. According to the minority, "a predominantly white district will not elect a black representative and a predominantly black district will not elect a white representative." Trial Exs. 371, para. 200; 372, para. 200.

the various courts, but by cumulative voting. The district court justified the use of cumulative voting on the grounds that: (1) it provided an effective remedy for the Section 2 violation; (2) "[b]ecause the system is a county-wide system, it does not at all interfere with the State's substantial interest in linkage," *i.e.*, maintaining a link between a judge's electoral and jurisdictional base; and, (3) it "prevents the court from having to consider population entirely when fashioning a remedial scheme." App. 114-15.

B. ***The Opinion of the Court of Appeals.*** The court of appeals reversed, holding that: Section 2 "precludes" the use of a non-district based remedy such as cumulative voting for judicial elections, even where such elections violated the Voting Rights Act, App. 6, 26, 31, 38; single-member districts "would violate Tennessee's important and substantial linkage interest" and could not be used for judicial elections even where at-large elections violated Section 2, App. 6, 25, 38; given the success of black preferred candidates in white/white contests plaintiffs failed to prove that whites voted as a bloc usually to defeat the candidates favored by black voters, App. 14 ("[t]he proper inquiry is not whether white candidates do or do not usually defeat black candidates, but whether minority-preferred candidates, whatever their race, usually lose"); and, based on the "totality of circumstances" at-large elections did not dilute minority voting strength. App. 37.[8]

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[8] The court also held that plaintiffs' claim of denial of minority influence raised in connection with the two member chancery court, for which a majority black single member district could not be drawn, was barred under Section 2. App. 21-2. The influence dilution claim is not presented in this petition.

The court of appeals agreed that blacks in Hamilton County were politically cohesive, or voted as a bloc. App. 9. The court also held that the districts proposed by plaintiffs were "contiguous and do not appear irregularly drawn," and followed precinct lines. App. 19.[9]

REASONS FOR GRANTING THE WRIT

This case presents substantial questions involving the application of Section 2 of the Voting Rights Act to the method of electing state court judges and the appropriate limits of federal judicial power in restricting the scope of an act of Congress. The questions are of exceptional importance since they have the potential for precluding *all* challenges to elections for judges, including those which admittedly dilute minority voting strength.[10]

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[9] The court plainly erred in finding that plaintiffs' three district plan for the criminal court, which it represented as having a total deviation of 10.98%, exceeded "permissible maximum deviation." App. 19, 25. The court failed to note that plaintiffs drew, as the district court found, an alternative three district plan with a total deviation of less than 10%. App. 45. Moreover, this Court has held that one person, one vote does not apply to judicial districts. Wells v. Edwards, 409 U.S. 1095 (1973), *aff'g* 347 F.Supp. 453, 454 (M.D.La. 1972). Even those courts which have applied a rule of "general equity" have established "[a] 15% maximum range of deviation . . . for a population variance among sub-districts within a judicial district." Martin v. Mabus, 700 F.Supp. 327, 332, 335 (S.D.Miss. 1988). All of plaintiffs' proposed plans comply with applicable equal protection standards.

[10] Issues identical to those presented here are presently before the Court in Davis v. Chiles, No.___ (petition for writ of certiorari mailed for filing on or about September 24, 1998), in which the court of appeals held that given the controlling precedents of the Eleventh Circuit "we would be compelled to

I. The Decision Below Conflicts with the Decisions of this Court and those of other Federal Courts

The court of appeals, citing its "philosophical aversion to the implementation of single-member districting in judicial elections," App. 21, held that "we disapprove of single-member districting as a remedy for judicial elections *even where they violate the Voting Rights Act*." App. 25, 31, 38 (emphasis added). The court further held that cumulative voting, and by necessary implication all other non-district based remedies, were a way of achieving proportional representation and were therefore "specifically preclude[d]" by Section 2(b). App. 26. According to the court of appeals, "even if we found that the plaintiffs' showing met the *Gingles* pre-conditions or satisfied the totality of the circumstances test, we would not approve the imposition of such a remedy." App. 31, 38.

The decision of the court of appeals that no remedy is available for a Section 2 violation in the context of judicial elections is nothing less than repeal of a critical and important provision of the Voting Rights Act, and is directly contrary to *Houston Lawyers' Assoc. v. Texas Attorney General*, 501 U.S. 419 (1991), and *Chisom v. Roemer*, 501 U.S. 380 (1991). In *Houston Lawyers'*, 501 U.S. at 426-27, the Court held that while a state's interest in circuitwide elections was a "legitimate factor to be considered . . . that interest does not automatically and in every case outweigh proof of racial vote dilution." The Court was unambiguous that "[i]f a State decides to elect its trial judges . . . those elections must be conducted in compliance with the Voting Rights Act." *Id.* at 426. Similarly, in

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rule against all plaintiffs who bring Section Two cases involving judicial elections." Davis v. Chiles, 139 F.3d 1414, 1423 n.19 (11th Cir. 1998).

Chisom v. Roemer, 501 U.S. at 404, the Court reiterated that "state judicial elections are included within the ambit of § 2 as amended."

The decision of the court of appeals is also contrary to the decisions of other federal courts. In *LULAC v. Clements*, 999 F.2d 831, 876 (5th Cir. 1993), the court held that even where a state's interest in circuitwide elections "is substantial . . . it will not always defeat § 2 liability." In *Mallory v. Eyrich*, 839 F.2d 275, 281 (6th Cir. 1988), the court held that "section 2 does apply to judicial elections." In *Milwaukee Branch of the NAACP v. Thompson*, 116 F.3d 1194, 1200 (7th Cir. 1997), the court held that the district court properly found that a state's interest in linkage does not "automatically outweigh[ ] proof of vote dilution." And in the prior decision of the court of appeals in *this* case, *Cousin v. McWherter*, 46 F.3d 568, 577 (6th Cir. 1995), the court expressly adopted the standard in *Houston Lawyers'* and held that "[t]he state's interest is only one factor to be considered in evaluating the totality of circumstances. It does not automatically outweigh proof of racial vote dilution."[11] Indeed, the only court to adopt an approach similar to that of the Sixth Circuit in this case is the Eleventh Circuit. *See supra* note 10. But the Eleventh Circuit has also candidly acknowledged that under its (and the Sixth Circuit's) standard "we would be compelled to rule against all plaintiffs who bring Section 2 cases involving judicial elections." *Davis v. Chiles*, 139 F.3d at 1423 n.19.

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[11] In its determination to reach an entirely different result here, the court of appeals simply ignored the fact that the prior decision in *Cousin v. McWherter* was the "law of the case," and that its holding was binding on the parties to this litigation. Griffin v. Michigan Dept. of Corrections, 5 F.3d 186, 190 (6th Cir. 1993).

Certiorari should be granted because the decision of the court of appeals is contrary to the decisions of this Court and other federal courts, and to resolve a dispute among the circuits whether Section 2 applies to judicial elections.

II. The Decision Below Violates the Voting Rights Act

In amending Section 2 in 1982, one of Congress' primary concerns was the potential for vote dilution through use of at-large elections. S.Rep. No. 417, 97th Cong., 2d Sess. 30 (1982) (Section 2 was designed to reach discriminatory "electoral system features such as at-large elections"). Thus, an at-large system that diluted minority voting strength would not be defensible merely because a jurisdiction could articulate a non-racial reason for its use. According to the Senate report, "[e]ven a consistently applied practice premised on a racially neutral policy would not negate a plaintiff's showing through other factors that the challenged practice denies minorities fair access to the process." S.Rep. No. 417 at 29 n.117.

In view of the Supremacy Clause, Art. VI of the Constitution, and the constitutionality of the Voting Rights Act, *South Carolina v. Katzenbach*, 383 U.S. 301, 337 (1966), *Bush v. Vera*, 116 S.Ct. 1941, 1968-69 (1996) (O'Connor, J., concurring and acknowledging the constitutionality of Section 2), the state's interest in linkage here cannot be described, factually or legally, as so compelling as to override a duly enacted act of Congress. As the Court held in *Katzenbach v. Morgan*, 384 U.S. 641, 647-48 (1966), "the States have no power to grant or withhold the franchise on conditions that are forbidden by the Fourteenth Amendment," or laws enacted by Congress to enforce its provisions. *Accord*, *Bush v. Vera*, 116 S.Ct. at 1969 ("it would be irresponsible for a State to disregard

the § 2 results test . . . [t]he Supremacy Clause obliges the States to comply with all constitutional exercises of Congress' power") (O'Connor, J., concurring); *Houston Lawyers'*, 501 U.S. at 426 ("[i]f a State decides to elect its trial judges . . . those elections must be conducted in compliance with the Voting Rights Act").

Federal judges, as much as states, are obligated to comply with and enforce all constitutional exercises of congressional power. That is particularly true in an area, such as voting, where Congress has "a specially informed legislative competence." *Katzenbach v. Morgan*, 384 U.S. at 656. Under the circumstances, it is not a court's prerogative to exalt its "philosophical aversion" over the will of Congress, but to determine instead if there is "a basis upon which Congress might predicate a judgment" that a given practice violates the Constitution. *Id.* Federal courts do not have a license to create statutory exceptions where Congress has declined to provide them. *Hallstrom v. Tillamook County*, 493 U.S. 20, 27 (1989).

At the very least, the state's interest in "linkage," which the court of appeals held outweighed any interest the plaintiffs had under Section 2, App. 25, 38, is one that must be supported by proof. *Sherbert v. Verner*, 374 U.S. 398, 407 (1973); *Elrod v. Burns*, 427 U.S. 347, 362 (1976) ("the burden is on the government to show the existence of such an interest"). Here, the court of appeals' representation that there has been "unswerving adherence to the principal of linkage" is incorrect, and ignores both the law and practice in Tennessee. App. 20, *citing LULAC*, 999 F.2d at 872. Under Tennessee law judicial officers are "judges and chancellors for the state at large," and may exercise judicial power totally "unlinked" to the jurisdiction that elected them. T.C.A. § 17-1-203. Any chancellor, circuit court judge, or criminal court judge may "exercise

by interchange, appointment, or designation the jurisdiction of any trial court other than that to which such judge or chancellor was elected or appointed." T.C.A. § 16-2-502.

Linkage, moreover, is ignored in actual practice. Judges who testified at trial said they routinely served outside the areas in which they are elected. *See, e.g.*, Peoples, T. Vol. III, 113-14; Meyer, T. Vol. III, 132. Judges from outside Hamilton County regularly adjudicate cases in Hamilton County, even though residents of the county are not able to vote for such judges. Peoples, T. Vol. III, 115. Any link between a judge's jurisdiction and electoral base is also severed every time a judge hears a case in which either the plaintiff or the defendant, or the victim of a crime, is not a resident of Hamilton County. The lack of linkage is an inherent feature of the existing system. Peoples, T. Vol. III, 143.

There is also no evidence in this case that judges in Hamilton County would be partial or would violate their oath of office under an alternative system of elections. Judge Howell Peoples said that Hamilton County judges would "absolutely not" compromise their oath of office and their duty to decide cases fairly if elected under a system of district elections. Peoples, T. Vol. III, 119-20. *See also*, Holcomb, T. Vol. III, 99.

Nor is there any evidence that districting plans have had a deleterious effect upon the administration of justice in the states which have adopted them. *See Martin v. Mabus*, 700 F.Supp. 327 (S.D.Miss. 1988) (imposing single member districts as a Section 2 remedy in eight judicial districts in Mississippi); *Clark v. Roemer*, 777 F.Supp. 471, 480 (M.D.La. 1991) (adopting subdistricts for elections in 11 judicial districts in Louisiana following a finding of a Section 2 violation), *appeal dismissed sub nom. Clark v.*

Edwards, 958 F.2d 614 (5th Cir. 1992). Witnesses in *Clark v. Roemer*, 777 F.Supp. at 477, testified that judges elected from subdistricts were unaffected by local pressures, and that having minorities on the bench had in fact improved the perception of fairness of the judicial system. *See also* Robert B. McDuff, "Judicial Elections and the Voting Rights Act," 38 *Loyola L. Rev.* 931, 968 (1993) ("[n]o reason exists to believe that judges elected from majority black or Hispanic districts would be any more susceptible to improper influences than the judges presently elected from the very high number of majority white districts in the various states"). Moreover, the notion that judges elected from majority white districts would be free of bias but that those elected from majority black districts would be infected by it is a dual standard rooted in the kind of racial stereotyping this Court has consistently deplored. *Shaw v. Reno*, 509 U.S. 630, 647 (1993). The petition should be granted because the court of appeals has vitiated an important act of Congress without a sufficient basis for doing so, and in disregard of the Supremacy Clause and the prior decisions of this Court.

III. The Court of Appeals Misconstrued the Section 2 Proviso

In rejecting a non-district based remedy, the court of appeals misconstrued the "proportional representation" disclaimer of Section 2 and ignored *Johnson v. DeGrandy*. Section 2(b) provides in relevant part that "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 42 U.S.C. § 1973(b). In *Johnson v. DeGrandy*, 512 U.S. at 1014 n.11, the Court held that the Section 2 proviso "speaks to the success of minority candidates, as distinct from the political or electoral power of

minority voters." While Section 2 does not guarantee the former, it protects the latter. *Id.* In addition, and contrary to the view of the court of appeals, "proportionality . . . is *always* relevant evidence in determining vote dilution." *Id.* at 1025 (O'Connor, J. concurring). *See also Gingles*, 478 U.S. at 48 n. 15 (identifying the "extent to which minority group members have been elected to public office" as one of the "most important" factors under Section 2).

The court of appeals erred in holding that Section 2(b) prohibited the adoption of a remedy designed to provide political power or electoral opportunities to minority voters. That is precisely what Section 2 was intended to do. *Johnson v. DeGrandy*, 512 U.S. at 1014 n.11 ("the ultimate right of § 2 is equality of opportunity").

The court of appeals also failed to note Justice Thomas' endorsement of cumulative voting as a remedy in Section 2 vote dilution cases in his concurring opinion in *Holder v. Hall*, 512 U.S. 874, 891 (1994), and his view that:

> nothing in our present understanding of the Voting Rights Act places a principled limit on the authority of federal courts that would prevent them from instituting a system of cumulative voting as a remedy under § 2.

Id. at 910. Although the Court said *in dicta* in *Timmons v. Twin Cities Area New Party*, 117 S.Ct. 1364, 1371 (1997), that "the Constitution does not require States . . . to move to proportional-representation elections," nothing in the decision suggests that cumulative voting would be impermissible where plaintiffs proved a Section 2 violation.

Cumulative voting has been adopted by consent by a number of jurisdictions as a remedy for minority vote dilution. *See, e.g., Dillard v. Chilton County Board of Education*, 699 F.Supp. 870, 876 n.7 (M.D.Ala. 1988) ("the

cumulative voting system proposed by the parties is an acceptable remedy for the claimed § 2 violations. . . . the system is fair, reasonable, and adequate and is not illegal or against public policy"). Cumulative voting was authorized as early as 1870 for justice of the peace elections in several Pennsylvania municipalities, and was adopted for the election of representatives of the Illinois legislature in 1872. Charles R. Buckalew, *Proportional Representation* 155, 233-42 (1872). Limited voting, a close cousin of cumulative voting, has been used for election of the associate judges of the supreme court of New York, as well as for judges of the circuit court of Cook County, Illinois. *Id.* at 155, 225. Cumulative voting is neither exotic nor difficult to understand or administer. *See* Edward Still, "Alternatives to Single-Member Districts," in *Minority Vote Dilution* (C. Davidson ed. 1984); Richard Engstrom, "Modified Multi-Seat Election Systems As Remedies for Minority Vote Dilution," 21 *Stetson L. Rev.* 743 (1992). The state's expert in this case testified at trial that he "generally" favored cumulative voting because it is not only a good remedy for minority vote dilution but "it helps all voters." Taebel, T. Vol. IV, 57.

The Voting Rights Act is acknowledged as "one of the most important civil rights statutes in American history." Chandler Davidson, "The Recent Evolution of Voting Rights Law Affecting Racial and Language Minorities," in *Quiet Revolution in the South* 36 (C. Davidson & B. Grofman eds. 1994). If the federal courts no longer intend to enforce the act in the context of judicial elections, such a momentous decision should be made by this Court.

IV. The *Gingles* Analysis of the Court of Appeals' Conflicts with the Decisions of this Court and Those of Other Circuits

In concluding that candidates favored by blacks were not usually defeated by whites voting as a bloc, the court of appeals relied primarily upon the analysis of defendants' expert, Dr. Delbert Taebel. App. 18 ("we believe Dr. Taebel's analysis shows that minority-preferred candidates can and do win countywide elections in Hamilton County").[12] Dr. Taebel's analysis consisted of 32 countywide general elections (*e.g.*, sheriff, governor, U.S. senate), only *one* of which involved a black candidate. Trial Ex. 378; Taebel, T. Vol. IV, p. 54. He excluded from his analysis countywide primary elections, including those in which the black candidate was preferred by black voters but was defeated by white bloc voting and thus never made it to the general election.[13] Focusing exclusively, as Dr. Taebel did, on the electoral system at the point where all but one black had already been eliminated gives a wholly distorted and unreliable picture of minority political participation.

And as improbable as it may seem, Dr. Taebel also excluded from his analysis *all* the black/white judicial contests – arguably the most relevant elections. Trial Ex. 378; T. Vol. IV, p. 54. He also excluded the 1984 and 1988 countywide presidential preference primaries, despite the

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[12] The court also relied upon Dr. Taebel's study in conducting its "totality of circumstances" analysis under *Gingles*, *e.g.*, in discussing the extent of racially polarized voting. App. 33.

[13] There were four such elections: the 1990 primary for juvenile court clerk; the 1978 primary for county council; the 1974 primary for registrar; and, the 1974 primary for county council. App. 94; Trial Ex. 313, pp. 2-4.

fact that they showed extremely high levels of racial bloc voting. Trial Ex. 313, p. 16.[14] The *Gingles* findings of the court of appeals, based upon Dr. Taebel's highly selective analysis of white/white contests, are a substantial departure from the standards applied in the other circuits, and cannot be regarded as sound or reliable.

All elections in which the residents of a jurisdiction voted tell us something about voter behavior, but there is a consensus among the lower federal courts that the most probative elections under a Section 2 inquiry are those which present the voters with a racial choice. In *Gingles*, Justice Brennan noted that the race of the voter, rather than the race of the candidate, was the proper focus in a polarized voting analysis. 478 U.S. at 68. While there was no majority support for this position, *cf.* 478 U.S. at 83 (White, J., concurring), the Court upheld the finding of bloc voting by the trial court based only upon an analysis of black/white elections.

Appellate courts have interpreted *Gingles* as meaning that "the race of the candidate is in general of less significance than the race of the voter – but only within the context of an election that offers voters the choice of supporting a viable minority candidate." *Citizens for a Better Gretna v. City of Gretna, La.*, 834 F.2d 496, 503 (5th Cir. 1987). *Accord, Sanchez v. State of Colorado*, 97 F.3d 1303, 1320 (10th Cir. 1996). The decisions of other courts

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[14] Not surprisingly, Dr. Taebel has been sharply criticized for his selective approach. The court in Williams v. City of Dallas, 734 F.Supp. 1317, 1392-93 (N.D.Tex. 1990), said that his testimony "was not credible or convincing," he "simply ignores" contests that are "inconsistent with his theory," and his testimony was "seriously weakened by his over-emphasis of white versus white elections (in which there was no viable black candidate)."

throughout the country have also stressed that black/white contests are the most salient. *See, e.g., Clarke v. City of Cincinnati*, 40 F.3d 807, 812 (6th Cir. 1994) ("[w]e agree with . . . Justices White and O'Connor that a candidate's race can be relevant to a § 2 inquiry"); *Westwego Citizens for Better Government v. Westwego*, 872 F.2d 1201, 1208 n.7 (5th Cir. 1989) ("the evidence most probative of racially polarized voting must be drawn from elections including both black and white candidates"); *Davis v. Chiles*, 139 F.3d at 1417 n.5 ("evidence drawn from elections involving black candidates is more probative in Section 2 cases"); *Jenkins v. Red Clay Consolidated School District Board of Education*, 4 F.3d 1103, 1128 (3d Cir. 1993) ("elections involving white candidates only are much less probative of racially polarized voting than elections involving both black and white candidates"); *Uno v. City of Holyoke*, 72 F.3d 973, 988 n.8 (1st Cir. 1995) ("elections in which minority candidates run are often especially probative on the issue of racial bloc voting"); *RWTAAAC v. McWherter*, 836 F.Supp. 453, 460 (W.D.Tenn. 1933) ("in Tennessee black-white elections are more probative of racial bloc voting than are white-white elections"); *Buchanan v. City of Jackson, Tenn.*, 683 F.Supp. 1515, 1531 (W.D.Tenn. 1988) ("while all elections are to be considered, elections in which there was a black candidate are more probative in this case upon the issue of whether voting is racially polarized and whether the candidates favored by blacks usually are defeated"); *Garza v. County of Los Angeles*, 756 F.Supp. 1298, 1332-33 (C.D.Cal. 1990), *aff'd*, 918 F.2d 763 (9th Cir. 1990) (findings of racial bloc voting based on minority/majority contests).

Simply because blacks are sometimes able to vote for a winning white candidate in a white/white contest does not mean that black voting strength is undiluted. Prior

cases are in agreement that minority voters do not enjoy an equal opportunity to participate in the political process when "[c]andidates favored by blacks can win, but only if the candidates are white." *Smith v. Clinton*, 678 F.Supp. 1310, 1318 (E.D.Ark.), *aff'd mem.*, 488 U.S. 988 (1988). *Accord, Citizens for a Better Gretna v. City of Gretna, La.*, 834 F.2d at 501-02; *Clark v. City of Cincinnati*, 40 F.3d at 812 ("the Act's guarantee of equal opportunity is not met when . . . '[c]andidates favored by blacks can win, but only if the candidates are white' "); *Sanchez v. State of Colorado*, 97 F.3d at 1321. As two commentators have noted:

> The scrutiny of all-white elections has surface appeal because the Voting Rights Act provides minority group members with an equal opportunity to elect candidates of their choice, not of their race. However, minority opportunities are still lacking if minority prospects for electing preferred candidates are restricted to elections in which no members of their own race are competing. Minorities are not full participants in the political process if they prefer to vote for minority candidates, but are limited to influencing the choice among white candidates. Conversely, would whites be full participants in the political process if their role were confined to influencing the choice among minority voters?

Allan J. Lichtman & J. Gerald Hebert, "A General Theory of Vote Dilution," 6 *La Raza L.J.* 1, 12-1 (1993).

Section 2 was designed to ensure that members of a protected class have an equal opportunity "to elect representatives of their choice." 42 U.S.C. § 1973(b). Those representatives may, of course, be white. But "it will frequently be the case that a black candidate is the choice of blacks, while a white candidate is the choice of whites." *Gingles*, 478 U.S. at 68. For that reason Section 2,

among other things, "seeks to ensure that members of a class have the right to an equal opportunity to obtain representation by members of their class." *NAACP v. City of Niagara Falls, N.Y.*, 65 F.3d 1002, 1015 (2d Cir. 1995). *Accord, Butts v. City of New York*, 779 F.2d 141, 148 (2d Cir. 1985).

Blacks have run for countywide office in Hamilton County on a number of occasions. They have almost without exception been preferred by black voters, but they have usually lost. The only black ever to win a countywide election was Ardena Garth, the public defender. As the district court found, her election was an exception and "not a reliable measure of racial bloc voting." App. 68. *See also Gingles*, 478 U.S. at 76 (where a system "generally works to dilute the minority vote, it cannot be defended on the ground that it sporadically and serendipitously benefits minority voters"). Defendants themselves admitted that in most "elections involving black/white candidates, the black preferred candidate is usually defeated by the white voting bloc." Brief of Appellants, p. 35.[15] The court of appeals' conclusion that "black candidates in Hamilton County will [not] usually lose for lack of sufficient white crossover support," App. 15, is both wrong and inexplicable.

The court of appeals also relied disproportionately, and improperly, upon exogenous contests in which blacks

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[15] The district court found that the average level of cohesion of black voters in the black/white *countywide* elections was 75%, and the average level of white crossover voting was 17%. App. 83. Taking these averages, and assuming equal rates of turnout and with blacks being 17% of county VAP, a black candidate could expect usually to get only about 27% of the votes in a countywide election (75% of 17% = 13%; 17% of 83% = 14%; 13% + 14% = 27%).

won in majority black state house, city council, and school board districts. As the court of appeals noted, a black won the 1974 Democratic Primary for House District 28, App. 15, but the court failed to point out that the district was majority black. Cole, T. Vol. I, p. 128. Similarly, blacks won the 1990 runoff election for city council District 7 and the 1990 general election for school board District 7, App. 15, but again both districts were majority (54%) black. Cole, T. Vol. I, p. 134; Trial Ex. 313, p. 11.

It is not surprising that blacks have often won in majority black districts despite, as the court of appeals found, "unanimous or near-unanimous white cohesion." App. 15. But Hamilton County is only 17% black VAP. Given unanimous or near-unanimous white cohesion, and assuming equal rates of turnout, a black candidate would not win in a countywide election.[16]

The court also erroneously and grossly inflated the level of white support for black candidates. The court claimed that Judge Williams "won 25% of the precincts with more than 90% white voting age population in his 1991 election." App. 15. To the contrary, what the evidence actually showed was that Williams got 25% of the vote in the precincts that were 90% or more white. Trial Ex. 313, p. 17. There is no evidence that Williams carried *any* 90% white precinct. Similarly, the court claimed that Brown, the losing black candidate in the 1980 election for

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[16] Another election cited by the court of appeals was the 1984 Democratic Presidential Preference Primary. App. 15. But as noted *supra* note 4, in a contest with five whites the black candidate (Jesse Jackson) got only 3% of the white vote, while the white turnout was just 4%. Far from showing equality of access, the 1984 primary underscores the fact that a black candidate – including Jesse Jackson – could not expect usually to win a countywide general election in Hamilton County.

state Supreme Court, "won 36% of the Hamilton County precincts with a voting age population that was 90% or more *white*." App. 15. Again, what the evidence actually showed was that Brown got 36% of the vote in the precincts that were 90% or more white. Trial Ex. 313, p. 16.

Ironically, the court of appeals held that plaintiffs' three seat plan for the criminal court was "deficient" for the reason that the majority-minority district was only 50.3% black and was therefore not a "safe district." App. 24. Such a finding concedes, however unintentionally, the merits of plaintiffs' Section 2 claim. If blacks cannot "safely" elect a candidate of choice in a district that is 50.3% black, they can hardly expect to elect such a candidate countywide where they are only 17% of VAP. Defendants, for their part, admitted that because of bloc voting a black candidate could not win in a district that was 34% black (the percentage in plaintiffs' proposed influence district for the chancery court) "[n]o matter how the figures are viewed." Brief of Appellants, p. 33.

The court of appeals' analysis of the totality of circumstances under *Gingles*, 378 U.S. at 36-7, was similarly infected by its over-reliance on white/white contests, its erroneous inflation of the level of white crossover voting, its reliance on black successes in majority black districts, and its implacable "philosophical aversion" to applying Section 2 to judicial elections. There *has*, as noted *supra*, been evidence of official discrimination in recent years, *e.g.*, the 1989 decision in *Brown*, the acquittal of Klan terrorists by an all white jury in the 1980s, the failure of county judges ever to appoint a black to the jury commission, Meyer, T. Vol. III, 139, and the failure of a black ever to be appointed to a county judgeship. App. 3.

There *is* a designated post requirement for all judicial elections in Hamilton County which enhances the discriminatory effect of at-large voting. Few blacks have run for countywide office because they think it would be futile. A system that depresses black candidacies is by definition discriminatory.

Recent contests *have* been characterized by racial appeals, *e.g.*, the 1993 contest for mayor of Chattanooga, and the 1990 general election for public defender.[17]

This Court has repeatedly stressed that Section 2 "requires 'an intensely local appraisal of the design and impact' of the contested electoral mechanism." *Gingles*, 478 U.S. at 79, *quoting Rogers v. Lodge*, 458 U.S. at 622. For that reason, among others, "the clearly-erroneous test of Rule 52(a) is the appropriate standard for appellate review of a finding of vote dilution." *Id.* Here the court of appeals, under the guise of "legal" analysis, by its own admission conducted "*de novo* review" of the district court's fact finding under the totality of the circumstances test. App. 31. In doing so, it overstepped its role as an appellate court and simply substituted its view of the facts for that of the district court.

The court of appeals' analysis under *Gingles* was based upon improper legal standards, failed to consider

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[17] The court of appeals also said it was "especially significant" that the district court found county judges were "responsive." App. 36. The legislative history of Section 2 makes clear that responsiveness is not only *not* "especially significant," but is generally to be avoided. *See* S.Rep. No. 417 at 29 n.116 ("[u]nresponsiveness is not an essential part of plaintiff's case"); H.Rep. No. 227, 97th Cong., 1st Sess. 30 (1981) (Section 2 "avoids highly subjective factors such [as] responsiveness").

all the relevant evidence, and is inconsistent with the decisions of this Court and those of other circuit courts.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MAXINE B. COUSIN, et al.,	)	
Plaintiffs-Appellees,	)	
v.	)	No. 96-6028
DON SUNDQUIST; STATE ELECTION COMMISSION; BROOK THOMPSON; HAMILTON COUNTY ELECTION COMMISSION; CAROLYN JACKSON,	)	
Defendants-Appellants.	)	

Appeal from the United States District Court for the Eastern District of Tennessee at Chattanooga.
No. 90-00339 – Thomas G. Hull, District Judge.

Argued: December 4, 1997

Decided and Filed: June 1, 1998

Before: WELLFORD, NORRIS, and BATCHELDER, Circuit Judges.

COUNSEL

ARGUED: Michael W. Catalano, OFFICE OF THE ATTORNEY GENERAL, GENERAL CIVIL DIVISION, Nashville, Tennessee, for Appellants. Laughlin McDonald, AMERICAN CIVIL LIBERTIES UNION FOUNDATION, Atlanta, Georgia, for Appellees. **ON BRIEF:** Michael W. Catalano, OFFICE OF THE ATTORNEY GENERAL, GENERAL CIVIL DIVISION, Nashville,

Tennessee, for Appellants. Laughlin McDonald, AMERICAN CIVIL LIBERTIES UNION FOUNDATION, Atlanta, Georgia, Richard H. Dinkins, WILLIAMS & DINKINS, Nashville, Tennessee, for Appellees. Edward Still, LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, Washington, D.C., for Amicus Curiae.

OPINION

HARRY W. WELLFORD, Circuit Judge. The defendants appeal the district court's finding that the conduct of judicial elections for positions on the Circuit Court, Criminal Court, Chancery Court, and General Sessions Court in Hamilton County, Tennessee, violates Section 2 of the Voting Rights Act. *See* 42 U.S.C. § 1973(b) (1994) (hereinafter "Section 2"). Specifically, the district court held that the black plaintiffs made out a case of vote dilution under the three part "results" test enunciated by the Supreme Court in *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1985), and also under the totality of the circumstances test drawn from the nine factors identified in the Senate Report accompanying the 1982 Amendments to the Act. *See* S. Rep. No. 417, 97th Cong., 2nd Sess. 28-29 (1982) (hereinafter "Senate Report"). For the reasons indicated, we **REVERSE.**

I. *BACKGROUND*

At the time this lawsuit was filed, the Hamilton County judiciary consisted of four Circuit Court judges, three Criminal Court judges, two Chancery Court judges,

and three General Sessions Court judges. After the district court handed down its opinion in this case, the Tennessee legislature passed a measure expanding the General Sessions Court in Hamilton County to five judges, legislation which was subsequently signed by Governor Don Sundquist and approved in a countywide referendum by the voters of Hamilton County. All of these judicial offices are elected at-large by the qualified voters of Hamilton County, and the elected judges serve eight-year terms. Tenn. Const. art. VI, § 4; Tenn.Code Ann. § 17-1-103 (1994). Except for the elections for the two recently-added General Sessions judges, which are to be nonpartisan, Tenn. H.B. 3273 § 1(c), the elections for these positions are partisan. Candidates for Hamilton County judicial offices run for separately designated positions, with the candidate receiving the highest number of votes declared the winner. Tenn.Code Ann. § 2-8-110 (1997 Supp.). In addition, Hamilton County judges must be members of the Tennessee Bar. Tenn.Code Ann. § 17-1-106 (1994). Under the existing system, no black lawyer has ever run for a position on the Circuit Court, Criminal Court, Chancery Court, or General Sessions Court in Hamilton County. Neither has the Governor of Tennessee ever appointed a black judge to the Hamilton County bench under his authority to designate judges to fill vacancies in the positions at issue here.

We have previously had occasion to review the controversy underlying this case, and our opinion in that matter was reported sub nom. *Cousin v. McWherter* at 46 F.3d 568 (6th Cir. 1995). In that case, as in this one, we considered the district court's finding of a Section 2 violation. We held that the district court had failed to provide

us with sufficiently detailed bases for its reasoning. *Id.* at 574 (noting that "we require a particularly definite record for voting rights cases") (citing *Velasquez v. City of Abilene*, 725 F.2d 1017, 1020 (5th Cir. 1984)). Specifically, we faulted the district court for analyzing the plaintiffs' claims under "an over-arching 'totality of the circumstances' " test and not clearly addressing the application of the *Gingles* pre-conditions to the claims. *Id.* at 575. We also found that the district court failed to weigh the state's interest in "linkage" – the identity of the jurisdictional and electoral bases of its judges – as a separate and legitimate factor to be considered as part of the totality of the circumstances, *id.* at 576, and erred in concluding that this interest was " 'nebulous at best.' " *Id.* at 577. We recognized that the state's interest was but one factor in the totality of the circumstances test, but held that the linkage interest was a substantial one. *Id.* (citing *League of United Latin Amer. Citizens v. Clements*, 999 F.2d 831 (5th Cir. 1993) (en banc) (hereinafter "LULAC")). *See also Houston Lawyers' Assoc. v. Texas Attorney Gen.*, 501 U.S. 419, 426-27 (1991) (finding a state's linkage interest to be a "legitimate factor" among the totality of the circumstances). Accordingly, we directed that, on remand, "the plaintiffs must produce evidence supporting the dilution claim sufficient to carry their burden of outweighing the state's interest." 46 F.3d at 577. We expressed no opinion on the merits of the case, but vacated the district court's decision and remanded for more specific findings:

> On remand, the district court is to determine the presence or absence of the three Gingles preconditions which plaintiffs must necessarily prove in order to establish their vote dilution claim; and if the court finds those preconditions

> do exist, to consider the totality of the circumstances in order to determine whether, in the context of all those circumstances, a Section 2 violation has occurred.

Id.

The district court's opinion on remand is now before us. *See Cousin v. McWherter*, 904 F.Supp. 686 (E.D. Tenn. 1995). The district court found that the plaintiffs had met the *Gingles* pre-conditions, and that the totality of the circumstances weighed in favor of finding Section 2 liability. The district court ordered the State of Tennessee to submit a new plan for electing Hamilton County judges within 90 days of December 27, 1995, the date its opinion was rendered. This deadline was subsequently extended twice. Though bills attempting to designate a remedy were proposed in both the Tennessee House and Senate in January of 1996, and passed by the Judiciary Committee of the respective houses in April, 1996, neither bill gained the approval of the full body. Since the Legislature failed to propose an appropriate remedy, the district court solicited the parties' suggestions in May, 1996. In response to this invitation, the State "[took] no position as to the remedy that this Court should impose. . . . "

The district court ultimately rejected the plaintiffs' proposed remedy – the creation of single-member districts within Hamilton County – and ordered a scheme of countywide cumulative voting for Hamilton County judgeships. Thus, under the district court's order, beginning with the August, 1998, regular election, judges for the Circuit Court, Criminal Court, Chancery Court, and General Sessions Court in Hamilton County would run in elections in which each voter is given the number of votes

corresponding to the number of seats to be filled and allowed to allocate those votes among the eligible candidates as he or she sees fit. Because the district court's order encompassed any additional judgeships created in the relevant courts before the August, 1998, election, it would therefore also apply to the two newly-created General Sessions Court judgeships.

We find that the district court erred in its analysis of the *Gingles* pre-conditions. Indeed, our conclusion that the plaintiffs did not meet the third pre-condition would justify our reversal of this case. Even if we had found that the plaintiffs had successfully carried their *Gingles* burden, however, we also find that the district court erred in its application of the totality of the circumstances test. Finally, we disagree with the propriety and rationale of the plaintiffs' and the district court's proposed remedies in this case. As the district court properly recognized, single-member districting would violate Tennessee's important and substantial linkage interest. In addition, two of the three districting plans presented by the plaintiffs present additional deficiencies such that we could not approve them even if we ignored the state's linkage interest. Moreover, we consider cumulative voting a mechanism for achieving proportional representation among the judges in Hamilton County, a purpose for which Section 2 of the Voting Rights Act was not intended, and find it a particularly inappropriate remedy when applied to the election of state court judges. All three reasons underlie the result we reach in this case.

Our treatment of these issues is consistent with the latest opinions from other Courts of Appeals dealing with Voting Rights Act challenges to the conduct of judicial

elections. *See Milwaukee Branch of the N.A.A.C.P. v. Thompson*, 116 F.3d 1194 (7th Cir. 1997) (involving a challenge to the election of circuit court and state appellate court judges in Milwaukee County), *cert. denied*, 118 S.Ct. 853 (1998); *White v. Alabama*, 74 F.3d 1058 (11th Cir. 1996) (involving a challenge to the method of electing judges to Alabama's civil and criminal appellate courts); *Nipper v. Smith*, 39 F.3d 1494 (11th Cir. 1994) (en banc) (involving a challenge to Florida's method of electing judges to the state's Fourth Judicial Circuit); *LULAC*, 999 F.2d 831 (involving a challenge to Texas' system of electing state court judges). Each appellate court found special problems, as we do in this case, in dealing with Voting Rights Act challenges to judicial elections and with proposed remedies such as single-member districting, cumulative voting, and court expansion. *See Milwaukee Branch*, 116 F.3d at 1200-01 (discussing single-member districting); *White*, 74 F.3d at 1070-75 (reversing the imposition of a remedy increasing the size of the state appellate courts and creating a nominating commission to appoint the additional judges); *Nipper*, 39 F.3d at 1542-47 (addressing the possible remedies of single-member districting, cumulative voting, and the creation of a new Judicial Circuit); *LULAC*, 999 F.2d at 872-76 (rejecting single-member districting and limited and cumulative voting). In addition, this case involves claims substantially similar to those presented in a recent case challenging the election of Ohio state judges under the Voting Rights Act before a district court within our own Circuit. *See Mallory v. State of Ohio*, Case No. C-2-95-831 (S.D. Ohio) (Oct. 20, 1997).

Although this case is similar in some respects to these recent cases, it also presents a completely novel

feature: the imposed remedy of cumulative voting in judicial elections. The plaintiffs conceded at oral argument that they knew of no federal case imposing this remedy in this electoral context. In fact, our research has revealed only one federal case that has ordered cumulative voting in any electoral context, and that in a case where the plaintiffs challenged the selection of a county *legislature*. *Cane v. Worcester County, Maryland*, 847 F.Supp. 369 (D.Md. 1994), *aff'd in part and rev'd in part*, 35 F.3d 921, 928 (4th Cir. 1994) (reversing the district court's imposition of cumulative voting because the district court did not adequately "give effect to the legislative policy judgments underlying the current legislative scheme"). We find it significant that the Fourth Circuit reversed the district court's imposition of cumulative voting in *Cane*, leaving us with no example in federal case law in which cumulative voting has been ordered and approved for elections to any office. Neither are we aware of any jurisdiction that has elected state trial judges by means of cumulative voting.

II. *STANDARD OF REVIEW*

"A district court's factual findings regarding Section 2 violations and the determination of whether vote dilution has occurred are ordinarily reviewed for clear error." *Cousin*, 46 F.3d at 574 (citing Fed. R. Civ. Pro. 52(a) and *Gingles*, 478 U.S. at 79). However, "Rule 52(a) does not inhibit an appellate court's power to correct errors of law, including those that may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law." *Gingles*, 478 U.S. at 79 (internal quotation marks omitted).

III. *THE GINGLES PRE-CONDITIONS*

To meet their burden of production in an alleged Section 2 violation, the plaintiffs must satisfy three pre-conditions, enunciated by the Supreme Court in *Gingles*. Those conditions are:

> [1] the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district. . . . [2] the minority group must be able to show that it is politically cohesive. . . . [and 3] the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate.

Id. at 50-51. Both the second and third *Gingles* pre-conditions thus require a court to consider the voting behavior of different races. However, the inquiry in the second pre-condition differs from that involved in the third: the former asks merely whether voters of the same race tend to vote alike, and the latter evaluates whether "a bloc-voting majority can routinely outvote" the minority, thereby "impair[ing] the ability of a protected class to elect candidates of its choice." *Johnson v. DeGrandy*, 512 U.S. 997, 1007 (1994) (internal citations and quotation marks omitted).

The state concedes, and uncontroverted evidence at trial showed, that blacks in Hamilton County vote sufficiently cohesively to satisfy the second *Gingles* pre-condition. The district court's finding to this effect is not clearly erroneous. However, we do find clear error in the district court's analysis of and conclusion concerning the third pre-condition, the extent of racial bloc voting. Since

we conclude that the plaintiffs failed to meet the third pre-condition, we need not conduct a detailed inquiry into the first factor, the geographic compactness of blacks in Hamilton County, for a Section 2 claim cannot proceed unless all three *Gingles* pre-conditions are satisfied. *See Voinovich v. Quilter*, 507 U.S. 146, 158 (1993) (disposing of the plaintiffs' Section 2 claim without analyzing the first *Gingles* pre-condition, since the Court found that the plaintiffs had failed to meet the third pre-condition). *See generally Gingles*, 478 U.S. at 50 (explaining that the circumstances contemplated by the three pre-conditions must necessarily exist "for multimember districts to operate to impair minority voters' ability to elect members of their choice"). We will review the district court's factual findings concerning racial bloc voting for clear error, and its legal conclusion that the third pre-condition has been met *de novo*. *Cousin*, 46 F.3d at 574; *Gingles*, 478 U.S. at 79.

The third *Gingles* pre-condition requires a Section 2 plaintiff to show that the white majority votes in a manner usually to defeat the black minority's preferred candidate. 478 U.S. at 51. Both parties in this case presented expert testimony concerning the existence and extent of racial bloc voting in Hamilton County. The district court relied heavily on the testimony of the plaintiffs' expert, Dr. Cole, *see Cousin*, 904 F.Supp. at 691-99 (quoting Dr. Cole at length), and on tabular data from Chattanooga City elections prepared for another case, *see id.* at 700-04 (reproducing Appendices A, B, and C from *Brown v. Board of Comm'rs of the City of Chattanooga*, 722 F.Supp. 380, 400-04 (E.D. Tenn. 1989) (evaluating an unrelated Section 2 challenge to Chattanooga's practice of electing City Commissioners at-large)), in holding that the plaintiffs

had met the third *Gingles* pre-condition. We hold that the district court erred in its reliance on both these bases and in the legal conclusions it drew from this data.

In his analysis of the issue of racial bloc voting, Dr. Cole examined elections pitting a white candidate against a black candidate. He considered black/white contests for judicial positions most relevant to this litigation, and he found five such contests: four elections for Chattanooga city judgeships between 1969 and 1991, and the 1980 Tennessee Supreme Court election. Because of the dearth of especially relevant contests, Cole also considered black/white contests for other elected positions, of which he found 29 examples between 1966 and 1993. Those additional contests included Democratic Presidential primaries; Democratic primaries for Hamilton County Council, Registrar, Public Defender, Juvenile Court Clerk, Quarterly County Court, and the Tennessee State House of Representatives; general elections for Hamilton County Trustee, Public Defender, Justice of the Peace, Constable, Quarterly County Court, and Tennessee State House of Representatives; and general elections for Chattanooga Mayor, City Council and School Board. For each election, Dr. Cole calculated the percentage of whites voting for the white candidate and the percentage of blacks voting for the black candidate, a figure said to represent racial "cohesion" in that election. Dr. Cole then averaged the cohesion figures, concluding that, for the five black/white judicial contests, the average black cohesion was 76% and the average white cohesion 80%; and for the 29 other black/white contests, the average black cohesion was 80% and the average white cohesion 88%. Dr. Cole used these averages in connection with black/

white voter turnout information, determining that, in order to succeed in a Hamilton County election, a black candidate would need a number of white crossover votes exceeding the 20% average crossover suggested by his white cohesion figure. Thus, Dr. Cole concluded, a black candidate would usually lose a countywide election in Hamilton County. In addition, Dr. Cole extrapolated these figures to predict results in hypothetical elections. For example, he testified that Walter F. Williams, a black candidate who defeated a white opponent to win election to a city judgeship in 1991, would not have won the election had it been held on a countywide basis.

The methodology of the defense expert, Dr. Taebel, differed significantly from that employed by his counterpart. Dr. Taebel considered elections presenting voters with a racial choice as well as elections involving only white candidates. Dr. Taebel chose his group of elections according to: 1) their "recency," under which criterion he limited his inquiry to elections taking place in the last ten years; 2) their relevance, by which he limited himself to elections that were countywide and partisan, as are elections for the Hamilton County judgeships at issue here; and 3) their "contestedness," by which he eliminated elections in which the losing candidate received less than 15% of the vote. Using these criteria, Dr. Taebel identified 32 elections between 1982 and 1992, of which 12 involved offices requiring the winner to be a lawyer. These "lawyer-qualified" offices included the Tennessee Supreme Court; Hamilton County Circuit, Criminal, Chancery, General Sessions, and Juvenile Courts; Hamilton County District Attorney General; and Hamilton County Public Defender. The other 20 elections, termed "exogenous"

elections by Dr. Taebel, involved offices such as Hamilton County Sheriff, County Executive, and Public Service Commissioner; Governor of Tennessee; and United States Senator and Representative.

Dr. Taebel tabulated the percentage of white and black votes received by each candidate in these 32 elections, a calculation which enabled him to identify the minority's preferred candidate in each. Dr. Taebel's analysis indicated that the minority's preferred candidate prevailed in seven of the 12 lawyer-qualified elections and in 16 of the 20 exogenous elections. Dr. Taebel's figures also showed that in four of the minority-preferred candidate's seven victories in the lawyer-qualified elections, and in nine of the minority-preferred candidate's 16 victories in the exogenous elections, that candidate defeated the preferred candidate of the white majority. Furthermore, those numbers also indicated that in three of the seven lawyer-qualified elections, and in seven of the 16 exogenous elections, won by the minority's preferred candidate, that candidate was also the preferred candidate of white voters. Given these conclusions, Dr. Taebel opined that the white majority did not regularly vote in such a way as to deprive black voters in Hamilton County of the opportunity to elect their preferred candidate.

We conclude that the district court's slavish adoption of Dr. Cole's analysis to support a finding that the plaintiffs met the third *Gingles* pre-condition was error. We reach this conclusion not merely because we disagree with Dr. Cole's methodology, but also because we find Dr. Taebel's study more relevant, and because several of Dr. Cole's data belie his conclusions. While Dr. Cole

testified that, in his opinion, elections pitting two white candidates against each other offered little information for a racial bloc voting analysis, we, like Dr. Taebel, agree with the Eleventh Circuit that such elections do offer relevant information in this inquiry:

> [W]e do not foreclose the consideration of electoral races involving only white candidates where the record indicates that one of the candidates was strongly preferred by black voters. . . . Where black voters have a genuine candidate of choice in an election involving only white candidates, then the results will be relevant to the question of whether racial bloc voting enables the white majority usually to defeat the minority's preferred candidate.

Nipper, 39 F.3d at 1540 (footnote omitted). *See also DeGrandy*, 512 U.S. at 1020 (recognizing that minority voters' candidate of choice may not always share their race, but will share "common political ground" even if such a candidate does not "represent perfection to every minority voter"). Dr. Cole's limiting his analysis to black/white elections thus focuses his inquiry too narrowly. The proper inquiry is not whether white candidates do or do not usually defeat black candidates, but whether minority-preferred candidates, whatever their race, usually lose. A close look at Dr. Cole's data confirms that, even in the universe of elections he analyzed, this result does not usually occur. Black candidates won two of Dr. Cole's five black/white judicial elections, an especially impressive success rate when one considers that Timberlake, the losing black candidate in two of the three elections won by whites, was not qualified to hold the office since he was not a lawyer. In addition, blacks won 9 of Dr. Cole's

29 non-judicial black/white elections. In four of those elections – the 1974 Democratic Primary for Tennessee House District 28, the 1984 Democratic Presidential Primary, the 1990 runoff election for City Council District 7, and the 1990 general election for School Board District 7 – the black candidate prevailed despite unanimous or near-unanimous white cohesion.

Moreover, the data from certain of Dr. Cole's elections reflect significant levels of white support for black candidates. For example, George Brown, the losing candidate in the 1980 election for the Tennessee Supreme Court, won 36% of the Hamilton County precincts with a voting age population that was 90% or more *white*. Similarly, City Judge Walter Williams won 25% of the precincts with more than 90% white voting age population in his 1991 election. Strong black candidates also occasionally attracted significant numbers of white crossover votes. As early as 1969, Bennie Harris had 31% white crossover support in his election to the position of City Judge. And Ardena Garth, the Hamilton County Public Defender, enjoyed 48% white crossover support in her 1990 election.

We reiterate that we point to these examples of black candidates' success only to show that Dr. Cole's conclusion – that black candidates in Hamilton County will usually lose for lack of sufficient white crossover support – is not borne out even by his own data. By indicating instances where black candidates have enjoyed white crossover support, we do not mean to suggest that we believe, or even that it has been shown, that black candidates are necessarily the preferred candidates of black

voters. Rather, *Gingles* teaches that the success of minority-preferred candidates is the standard of evaluation for purposes of the third pre-condition. 478 U.S. at 51. *But cf. Clarke v. City of Cincinnati*, 40 F.3d 807, 812 (6th Cir. 1994) (holding that "a candidate's race can be relevant to a [Section] 2 inquiry"). Mindful of the *Gingles* standard, we find it significant, for example, that in three of Dr. Cole's 29 elections – the 1966 general election for Justice of the Peace, the 1968 general election for Hamilton County Trustee, and the 1972 Democratic Primary for Tennessee House District 28 – the winning white candidate was also the preferred candidate of blacks. This standard also underlies our holding that the district court improperly ignored Dr. Taebel's statistics, which accurately reflected the potentiality that the minority's preferred candidate might be a white person. *See Johnson*, 512 U.S. at 1020.

The district court also based its holding that the plaintiffs had met the third *Gingles* pre-condition on tabular data in Appendices A, B, and C of the opinion in the *Brown* case. *See Cousin*, 904 F. Supp. at 700-04 (quoting *Brown*, 722 F. Supp. at 400-404). In *Brown*, the plaintiffs successfully challenged Chattanooga's practice of electing City Commission members from the city at-large. The factual circumstances of *Brown* thus differ significantly from the instant case: *Brown* involved citywide, not countywide elections; the elected body at issue was legislative, not judicial; and the elections studied were nonpartisan, not partisan. *See* 722 F. Supp. at 382. These differences counsel us to review extremely carefully any conclusions reached in the *Brown* case. However, since the *Brown* Appendices formed at least a partial basis for the court's

finding regarding the third pre-condition, we will review them for any light they will shed on our analysis.

These tables collected data from quadrennial Chattanooga City Commission elections from 1971 to 1987 (Appendix A), Chattanooga City judge contests from 1969 to 1987 (Appendix B), and other elections and referenda from 1970 to 1988 (Appendix C); separated the percentages of the white and black vote for each candidate; and designated each election as "Racially Polarized" or "Not Racially Polarized." *See id.* The *Brown* court found the majority of the elections in the Appendices "Racially Polarized." To the extent that the district court here relied on this designation in reaching its conclusion regarding the third *Gingles* pre-condition in this case, it committed clear error. The designation given the elections by the *Brown* court is relevant to this litigation, if at all, only in an analysis of the second *Gingles* pre-condition – the extent of political cohesion – a factor that is not in dispute. Viewing the *Brown* data through the proper perspective for an analysis of the third pre-condition, we find no basis for a finding that the white majority usually votes in a manner that denies victory to the minority's preferred candidate. In 15 of the 31 City Commission elections, and in five of the eight City Judge contests, the candidate garnering the largest percentage of the black vote also won the election. Moreover, the position supported by a majority of black voters in the 1978 referendum on the repeal of Tennessee's constitutional ban on interracial marriage, the 1978 referendum on the elected school board, and the 1984 referendum on the Metro Charter prevailed in each election. In short, the district court erred when it found the *Brown* data supported its

finding that the plaintiffs here met the third *Gingles* pre-condition.

We find considerable methodological deficiency in Dr. Cole's analysis, and we also believe that neither Dr. Cole's statistics nor the election data from *Brown* support the district court's position. Furthermore, we believe Dr. Taebel's analysis shows that minority-preferred candidates can and do win countywide elections in Hamilton County. We therefore hold that the plaintiffs have failed to meet the third *Gingles* pre-condition, and accordingly we **REVERSE** the district court's holding to the contrary.

Because the third pre-condition is not satisfied, the plaintiffs' vote dilution claim in this case must fail. Since the claim has not passed even the initial hurdles, the plaintiffs are clearly not entitled to any remedy at all. We could, therefore, stop our inquiry, reverse the judgment, and vacate the district court's order at this point. However, mindful of the potentiality that there may be future challenges to the conduct of other lawyer-qualified elections in Hamilton County, we find it proper, and perhaps necessary, to express our views concerning the two alternative remedies proposed in this case: single-member districting, as the plaintiffs' proposed, and cumulative voting, as the district court ultimately ordered. *See Milwaukee Branch*, 116 F.3d at 1199 (continuing its analysis of the alleged Section 2 violation under similar circumstances).

The plaintiffs submitted three plans for dividing Hamilton County into single-member districts corresponding to the number of judgeships on a particular court: a proposed four district plan for the Circuit Court,

a three district plan for the Criminal and General Sessions Courts, and a two district plan for the Chancery Court. The four district plan reflected a maximum deviation in population between the districts of 4.74%, and included one district where the black voting age population constituted a 60% majority. The three district plan had a maximum deviation in population between the districts of 10.98%, and achieved one district with a bare 50.3% majority black voting age population. Under the two district plan, blacks made up an "influence district" of 34% in one of the two districts. The districts in all three plans are contiguous and do not appear irregularly drawn; in addition, the districting plans were achieved without dividing any existing precinct. *Cousin*, 904 F. Supp. at 688-89.

Even if we had held plaintiffs' vote dilution claim valid, we would not have affirmed a remedy such as they proposed in this case because it is at odds with the important state interest in "linkage." Proper adherence to the principle of linkage ensures that a state court judge serves the entire jurisdiction from which he or she is elected, and that the entire electorate which will be subject to that judge's jurisdiction has the opportunity to hold him or her accountable at the polls. Single-member districts, as several courts have noted, eliminate the identity between the electoral and jurisdictional bases of its judges, thereby violating the state's significant linkage interest. *Milwaukee Branch*, 116 F.3d at 1201; *Nipper*, 39 F.3d at 1542-46; *LULAC*, 999 F.2d at 868-76. This linkage interest is also important because it lies at the heart of philosophical decisions about the role of judging in our

system of government, a concern eloquently expressed by the Fifth Circuit in *LULAC:*

> The decision to make jurisdiction and electoral bases coterminous is more than a decision about how to elect state judges. It is a decision of what *constitutes* a state court judge. Such a decision is as much a decision about the structure of the judicial office as the office's explicit qualifications such as bar membership or the age of judges. The collective voice of generations by their unswerving adherence to the principle of linkage through times of extraordinary growth and change speaks to us with power. Tradition, of course, does not make right of wrong, but we must be cautious when asked to embrace a new revelation that right has so long been wrong. There is no evidence that linkage was created and consistently maintained to stifle minority votes. Tradition speaks to us about its defining role – imparting its deep running sense that this is what judging is about.

LULAC, 999 F.2d at 872. In addition to such traditional concerns, the *LULAC* court correctly noted that maintaining linkage and shunning single-member districting actually favors minorities who may be concerned that their particular interests are not represented on the bench:

> the subdistricting remedy sought by plaintiffs provides most judges with the same opportunity to ignore minority voters' interests without fear of political reprisal they would possess if elections were in fact dominated by racial bloc voting.
>
> * * *

> After subdistricting, a handful of judges would be elected from subdistricts with a majority of minority voters. Creating safe districts would leave all but a few subdistricts stripped of nearly all minority members. The great majority of judges would be elected entirely by white voters. Minority litigants would not necessarily have their cases assigned to one of the few judges elected by minority voters. Rather the overwhelming probability would be that the minority litigant would appear before a judge who has little direct political interest in being responsive to minority concerns.

999 F.2d at 859, 873 (internal quotation marks omitted). *See also Nipper*, 39 F.3d at 1535 n. 79, 1543 (quoting *LULAC* with approval). We agree with the reasoning of the *LULAC* court. Similar notions motivated our holding in the previous *Cousin* opinion that the state's linkage interest was "legitimate" and "substantial." 46 F.3d at 577.

In addition to our philosophical aversion to the implementation of single-member districting in judicial elections, we note that the particular single-member districting plans proposed in this case present additional deficiencies. We find the plaintiffs' two district plan, which includes a district with a maximum 34% black voting age population, particularly lacking because it is based on the premise that the Section 2 violation in this case consists of an impairment of the minority's ability to *influence* the outcome of the election, rather than to *determine* it. *Cousin*, 904 F. Supp. at 713. As the following analysis will indicate, we would reverse any decision to allow such a claim to proceed since we do not feel that an

"influence" claim is permitted under the Voting Rights Act.

The district court allowed this "influence" claim to proceed because it interpreted the legislative history of the 1982 Amendments to the Voting Rights Act to permit, without explicitly creating, such a claim. This legislative history consisted of the Senate Report's indication that the "totality of the circumstances" statutory language directs an inquiry as to whether the minority's voting strength has been " 'minimized or cancelled out,' " and the fact that the Report did not include the geographic compactness requirement, later enunciated by the *Gingles* Court. *Cousin*, 904 F.Supp. at 713 (quoting Senate Report). The district court also drew support for its position from the fact that the *Gingles* Court, albeit in a footnote, did not preclude an influence claim. *Id.* at 712-13 (citing *Gingles*, 478 U.S. at 46 n.12).

The Supreme Court has yet to decide squarely whether Section 2 permits an influence claim. Our reading of *Gingles'* footnote 12, in contrast to the district court's interpretation, reveals a Court concerned with limiting its holding, not authorizing its expansive use:

> The claim we address in this opinion is one in which the plaintiffs alleged and attempted to prove that their ability *to elect* the representatives of their choice was impaired by the selection of a multimember electoral structure. We have no occasion to consider whether § 2 permits, and if it does, what standards should pertain to, a claim brought by a minority group that is not sufficiently large and compact to constitute a majority in a single-member district,

> alleging that the use of a multimember district impairs its ability *to influence* elections.
>
> We also note that we have no occasion to consider whether the standards we apply to respondents' claim that multimember districts operate to dilute the vote of geographically cohesive minority groups that are large enough to constitute majorities in single-member districts and that are contained within the boundaries of the challenged multimember districts, are fully pertinent to other sorts of vote dilution claims, such as a claim alleging that the splitting of a large and geographically cohesive minority between two or more multimember or single-member districts resulted in the dilution of the minority vote.

478 U.S. at 46 n.12 (emphasis in original). Later, the Court addressed a Section 2 claim alleging injury in that minority black voters lacked even a sufficient minority to influence elections, denying them the ability to elect candidates of their choice by attracting white crossover votes. *Voinovich*, 507 U.S. at 158. In addressing the claim, the *Voinovich* Court assumed, without deciding, that an influence claim essentially similar to the one described in paragraph two of *Gingles* footnote 12 was actionable under Section 2. *Id.* at 154. The Court recognized that if such a claim were actionable, the analysis of *Gingles'* first pre-condition "would have to be modified or eliminated," but the Court did not have to take this step because it found that the plaintiffs had not satisfied the third *Gingles* pre-condition. *Id.* at 158.

We believe the district court erred in assuming from the *Gingles* footnote and the Senate Report that an influence claim is actionable under Section 2. The Supreme Court's reluctance in *Voinovich* to state that Section 2 authorizes such a claim, when the Court was squarely presented with factual circumstances favorable to so holding, suggests that the existence of an influence cause of action should not be inferred from the *Gingles* footnote, which describes a case the Court has never decided, and legislative history that supports the district court's position only by suggestion. We therefore view the plaintiffs' Chancery Court-related claim as an impermissible "influence" claim, wrongly asserted under Section 2 of the Voting Rights Act. *Accord McNeil v. Springfield Voting Dist.*, 851 F.2d 937, 947-48 (7th Cir. 1988) (concluding that "influence" claims undermine the purpose the *Gingles* pre-conditions and refusing to consider such claims). For this reason, we believe the plaintiffs proposed two district system is particularly ill-conceived.

We also find the plaintiffs' proposed three district plan deficient. Even in the one district where blacks constitute a voting age population majority, their 50.3% margin is so razor-thin that it does not meet the "safe district" standards of courts that have approved race-conscious realignments in other electoral contexts. *See Latino Political Action Comm. v. City of Boston*, 784 F.2d 409, 414 (1st Cir. 1986) (holding that a "65 percent [majority of the general population] . . . is a generally accepted threshold" where voting is racially polarized) (Breyer, J.); *United Jewish Org. v. Carey*, 430 U.S. 144, 163-64 (1977) (finding it reasonable to conclude that at 65% minority population in a district is required to yield a majority of minority voting

age population). *Cf. McGhee v. Granville County, North Carolina*, 860 F.2d 110, 113 (4th Cir. 1988) (acknowledging the plaintiffs' objection to a proposed remedial plan containing a district with a 51.8% black voting age population majority since such a slim margin would give "no better than a fighting change" [sic] for a black candidate to win, but holding that the plan complied with relevant standards). In addition, the fact that the three districts exceed the permissible maximum deviation in population lends further support to the notion that this plan is particularly inappropriate as a remedy. *See Brown v. Thomson*, 462 U.S. 835, 842-43 (1983) (stating that a maximum deviation in population of more than 10% among legislative districts would make out a prima facie case of invidious discrimination under the Fourteenth Amendment).

We do not mean to suggest by these additional criticisms of the plaintiffs' two and three district plans that we would have approved a two or three district plan that achieved a more substantial black voting age population majority while complying with the maximum deviation figure. Nor do we wish to suggest, with respect to the three district plan, that we believe a district with a higher majority of black voting age population would necessarily elect a black candidate. We would not have approved any such a districting plan, as preceding paragraphs suggest, both because we find no vote dilution in Hamilton County judicial elections and because we disapprove of single-member districting as a remedy for judicial elections even where they violate the Voting Rights Act.

Similarly, we feel that cumulative voting, the remedy ordered by the district court in this case, is an inappropriate remedy for a Section 2 claim, and especially so when imposed on the election of state court judges.

Section 2 of the Voting Rights Act specifically precludes its use to achieve proportional representation. *See* 42 U.S.C. § 1973(b) ("Provided, that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population."). *See also White v. Alabama*, 74 F.3d 1058, 1071-3 (11th Cir. 1996) (holding that the Voting Rights Act cannot be used as a vehicle for achieving proportional representation in Alabama's appellate courts). Yet this is precisely the effect and, proponents would argue, the strength of cumulative voting as a remedy. *See* Lani Guinier, The Tyranny of the Majority 14-5 (1994); Pamela Karlan, Maps and Misreadings: The Role of Geographical Compactness in Racial Vote Dilution Litigation, 24 Harv. C.R.-C.L. L.Rev. 173, 231-6 (1989). The imposition of cumulative voting is thus meant to achieve an end not contemplated in the Voting Rights Act. As we indicated earlier, we have discovered only one other district court, in a case involving not judicial elections but apportionment of the county legislature, that has ordered this remedy for a Section 2 violation, a disposition subsequently reversed by the Court of Appeals. *See Cane*, 847 F. Supp. 369 (D.Md. 1994), *aff'd in part and rev'd in part*, 35 F.3d 921.

The ultimate irony in this case is that even under the district court's mandated system of cumulative voting, proportional representation on the Hamilton County bench, which we believe may be the unstated goal of both

the plaintiffs and the district court, is not assured. Political science teaches that the "threshold of exclusion" – the percentage of the vote necessary to guarantee the voting minority a seat – in cumulative voting equals 1 ÷ (1 + number of seats). Karlan at 222, 232. Applying that formula to the offices at issue here, we note that the threshold of exclusion (20% for Circuit Court, 25% for Criminal Court, 33% for Chancery Court, and 16.7% for General Sessions Court) exceeds the black voting age population in Hamilton County (17%) for all the relevant offices except for the newly-created five-judge General Sessions Court. *See Cousin*, 904 F.Supp. at 695 (quoting Dr. Cole's testimony that the black voting age population in Hamilton County was 17% in 1990).

Cumulative voting is particularly inappropriate in judicial elections. In Hamilton County, the practical effect of this remedy would require judicial colleagues who previously ran for designated positions on the Circuit, Criminal, Chancery, and General Sessions Courts, to run against each other. This result would, predictably, undermine the treasured institution of judicial collegiality, potentially complicating the disposition of administrative matters in the Eleventh Judicial Circuit and the General Sessions Court in Hamilton County. *See Nipper*, 39 F.3d at 1546. In addition, forcing these judges to oppose each other would, to a substantial degree, deny them the full appreciation of the benefits of their incumbency, increasing the potential that the election would unseat some of the hardest-working and most efficient judges in the state of Tennessee. *See* Annual Report of the Tennessee Judiciary 1996-97 (indicating that Hamilton County Circuit and Chancery Court judges shoulder among the highest

workloads in Tennessee in terms of filings and dispositions per judge). Not only would cumulative voting undermine judicial collegiality, independence, and quality, the Eleventh Circuit has explained, but

> a cumulative voting system, like a subdistricting system, would encourage racial bloc voting. That, in turn, would necessarily fuel the notion that judges were influenced by race when administering justice.
>
> The only benefit black voters could legitimately expect from a court order implementing one of the appellants' proposed remedies, which would enable them to elect black judges of their choice, is the *perception* that the challenged circuit and county judicial systems are colorblind. . . .
>
> By altering the current electoral schemes for the express purpose of electing more black judges, the federal court in fashioning the alteration, and the state courts in implementing it, would be proclaiming that race matters in the administration of justice. . . . Like other race-conscious remedies, this tends to entrench the very practices and stereotypes the Equal Protection Clause is set against. The case at hand, therefore, presents a remedial paradox: A remedy designed to foster a perception of fairness in the administration of justice would likely create, by the public policy statement it would make, perceptions that undermine that very ideal. In the eyes of the public and litigants, at least, justice would not remain colorblind.

Nipper, 39 F.3d at 1546 (citations, internal quotation marks, and footnote omitted). Finally, in addition to these

perception concerns, "cumulative voting raises the spectre of other organized interest groups seizing control of a fraction of the state judiciary. This concern alone should caution against heralding limited and cumulative voting as panaceas for the contradictions inherent in applying section 2 to judicial elections." Mary Thrower Wickham, Note, Mapping the Morass: Application of Section 2 of the Voting Rights Act to Judicial Elections, 33 Wm. & Mary L.Rev. 1251, 1284 (1992). We share these concerns.

Even more than these concerns about perception and the prospect of a judicial branch riven by faction, we are troubled by the political theory represented in the plaintiffs' claim and the district court's opinion: that the absence of black judges on the Hamilton County bench automatically indicates a dilution of blacks' right to vote and calls for a remedy – whether single member districting, as the plaintiffs would have it, or at-large cumulative voting, as the district court ordered – that will increase the possibility of electing a black judge to a Circuit, Criminal, Chancery, or General Sessions judgeship. *See Milwaukee Branch of the N.A.A.C.P. v. Thompson*, 116 F.3d 1194, 1196 (7th Cir. 1997) ("The possibility of increasing minority representation does not compel a jurisdiction to achieve that outcome, unless the three [*Gingles*] conditions have been met and the judge is satisfied that minority voters have lacked an equal opportunity to participate in the political process."). Justice Thomas, in his eloquent concurrence in *Holder v. Hall*, has criticized the notion

> that the purpose of the vote – or of the fully "effective" vote – is controlling seats. In other words, in an effort to develop standards for assessing claims of dilution, the Court has

> adopted the view that members of any numerically significant minority are denied a fully effective use of the franchise unless they are able to control seats in an elected body. Under this theory, votes that do not control a representative are essentially wasted; those who cast them go unrepresented and are just as surely disenfranchised as if they had been barred from registering. Such conclusions, of course, depend upon a certain theory of the "effective" vote, a theory that is not inherent in the concept of representative democracy itself.

512 U.S. 874, 899 (1994) (Thomas, J., concurring) (citation omitted). Justice Thomas correctly points out that "the proper apportionment of political power in a representative democracy" constitutes a "[matter] of political theory . . . beyond the ordinary sphere of federal judges." *Id.* at 901. Like Justice Thomas, we fear that cumulative voting is a step in the evolution of the current strategy of creating majority-minority districts to produce proportional results: "In principle, cumulative voting and other non-district-based methods of effecting proportional representation are simply more efficient and straightforward mechanisms for achieving what has already become our tacit objective: roughly proportional allocation of political power according to race." *Id.* at 912.

Holder principally addressed the concept of proportional representation as it affected legislative offices. For all the reasons stated above, we find cumulative voting to be even more inappropriate when applied to judicial elections than to legislative contests. We cannot reconcile

such a voting practice with the goal of the blind administration of justice, particularly since judges are not representatives who can or should solicit votes to further their political aims. Therefore, even if we found that the plaintiffs' showing met the *Gingles* pre-conditions or satisfied the totality of the circumstances test, we would not approve the imposition of such a remedy.

IV. *THE TOTALITY OF THE CIRCUMSTANCES TEST*

As mentioned earlier, our conclusion that the third *Gingles* hurdle is not met would justify our reversal of this case. However, we also find error in the legal conclusions the district court drew from its analysis of the "totality of the circumstances" test, derived from the Senate Report accompanying the Voting Rights Act and quoted in *Gingles*. *See* Senate Report at 28-29, *quoted in Gingles*, 478 U.S. at 36-37. The Senate Report lists several "typical factors" that will be relevant in evaluating the totality of the circumstances in a Section 2 claim although, as the *Gingles* Court recognized, that list "is neither comprehensive nor exclusive," nor is it to be applied with mathematical precision. 478 U.S. at 45 (quoting the Senate Report) (internal quotation marks and citations omitted).

We disagree with the district court's conclusion that the totality of the circumstances indicated a finding of vote dilution. *Cousin*, 904 F.Supp. at 712. The district court's application of this test involved a mixed question of law and fact. We therefore undertake *de novo* review of the district court's analysis of the totality of the circumstances, assessing each of the Senate Report's typical

factors in turn, and of the district court's legal conclusion that the totality of the circumstances indicated a Section 2 violation. *See Gingles,* 478 U.S. at 79 (recognizing appellate courts' power to correct errors of law infecting mixed questions of law and fact).

1. History of Discriminatory Efforts to Limit Black Voting

That Hamilton County, as part of the post-Reconstruction South, was not immune to the passage of Jim Crow laws and overt racism in the late 19th and early 20th century, as the district court found, cannot be a surprise. However, more relevant to this litigation, in our opinion, is the history behind the particular voting practice challenged here. On that score, the district court found "no proof that the establishment and maintenance of the present judicial system in Hamilton County was in any way a pretext for diluting minority voting rights." *Cousin,* 904 F.Supp. at 712.

Since we accept the district court's finding with respect to the origin and maintenance of at-large judicial elections in Hamilton County, we do not believe that the inglorious history of past discrimination against blacks voting rights cuts as clearly in favor of a finding of vote dilution as the district court would have it. In making this determination, we do not mean to belittle the pain caused, and the Constitutional violations represented, by the history the district court recounted. *See id.* at 705-06. We merely differ as to the legal significance of that history in making out a vote dilution claim in the 1990s. If anything, the record in this case suggests that the past 30

years have been marked by a complete absence of official discrimination against blacks' voting rights in Hamilton County and, as voter registration and turnout data indicate, by vigorous black participation in the democratic process.

2. Extent of Racially Polarized Elections

Since the state concedes that voting is racially polarized in Hamilton County, we do not disturb the district court's finding to that effect. *See id.* at 706-07. As our analysis in section III indicated, however, the outcome of even a racially polarized election does not always disfavor minority voters, a result which does not support a claim of vote dilution.

3. Suspect Electoral Practices or Procedures

The district court's analysis of this factor implied that Hamilton County comprises an unusually and impermissibly large electoral district for the judicial offices at issue here, and that the size of the district enhances the opportunity for discrimination against blacks. We disagree with this premise. Hamilton County is not unusually large in comparison to other judicial districts in Tennessee. Eight other judicial districts in Tennessee are comprised of a single county, *see* Tenn.Code Ann. § 16-2-506 (1997 Supp.), and in every district the Circuit, Criminal, Chancery, and General Sessions Courts are elected at-large, as mandated by the Tennessee Constitution and by state statute. Tenn. Const. art. VI, § 4; Tenn.Code Ann. §§ 17-1-103 (1994). In fact, both Shelby

and Davidson Counties comprise single-county judicial districts, and both counties far exceed Hamilton County in population. Apart from Hamilton County's size, there is no even allegedly discriminatory mechanism to limit or discourage black voting in Hamilton County. To the extent that the district court found that this factor indicated a Section 2 violation, therefore, we believe the court erred.

4. Denial of Opportunity to Run for Office

The parties agree that there is no slating process for judicial elections in Hamilton County, and there is no allegation that minorities have been denied the opportunity to run for these offices. We note only that the lack of a slating process or other obstacle to candidacy cuts against a finding of vote dilution.

5. Effects of Past Discrimination on Political Participation

We do not disturb the district court's conclusion that, as a group, blacks in Hamilton County "have been isolated from the economic and political main stream. . . . [and] remain a socioeconomically depressed minority with a limited ability to fund and mount political campaigns." *Cousin*, 904 F. Supp. at 710.

6. Overt or Subtle Racial Appeals in Political Campaigns

Although the district court made no factual finding with respect to this factor, only very isolated anecdotal

evidence in record suggested that racial appeals played any part in Hamilton County's political life. Indeed, as the Brown court noted, "Chattanooga has for the most part been spared both overt and subtle racial appeals in elections." 722 F.Supp. at 396.

7. Extent to Which Blacks Have Been Elected

Although the district court concluded that very few blacks hold office in Hamilton County, we consider more relevant the extent to which blacks win when they run for office. Again, we refer to our analysis of racial bloc voting in section III, which showed that blacks in Hamilton County can and do get elected to public office.

With respect to the particular offices at issue in this litigation, the district court accurately stated that, though there are qualified blacks in Hamilton County, "no black has ever won a majority of the votes in a county-wide judicial contest." *Cousin*, 904 F.Supp. at 711. This assertion, however, overlooks two additional important facts. First, no black has ever run for a county judgeship, a phenomenon surely attributable at least in part to the perception that it is very difficult for a black candidate to win a countywide election. That political success is difficult, however, does not mean it is unmanageable, as the testimony of Chattanooga City Judge Walter Williams regarding the possibility of a black candidate's election to a countywide judgeship indicated. Second, evidence at trial showed that only 27 black lawyers live in Hamilton County, and three of that number already hold "lawyer-qualified" offices – City Judges Williams and Bennie Harris, and Public Defender Garth. *See LULAC*, 999 F.2d

at 865 ("A functional analysis of the electoral system must recognize the impact of limited pools of eligible candidates on the number of minority judges that has resulted."). We do not agree that this factor clearly supports a finding of vote dilution under these circumstances.

8. Responsiveness of Elected Officials to Minority Needs

The district court's finding with respect to this factor bears quoting at length:

> The Circuit Court, Chancery Court, Criminal Court and General Sessions Court Judges of Hamilton County are responsive to the particularized needs of the black community in Hamilton County inasmuch as these judges are fair and impartial in the disposition of matters before them.
>
> Specifically, there is no proof that any of the present judges have discriminated against any African-Americans who have been involved in the judicial process as plaintiffs, defendants, attorneys, jurors, or witnesses.

Cousin, 904 F.Supp. at 711. We agree with the district court's findings regarding the responsiveness of the individual judges who currently hold Hamilton County judgeships. Indeed, we regard these findings as especially significant, for the unstated proposition underlying a claim of vote dilution is that the minority's failure to gain racial representation in the relevant office has somehow prejudiced that group. The district court's findings of fact illustrate, to the contrary, that the Hamilton

County bench currently performs as the judicial branch in our system of government was meant to function.

9. Tennessee's Interest in Maintaining At-Large Elections

The district court concluded "that under the totality of the circumstances . . . Tennessee's state interest in at-large elections will not suffice to overcome a violation of Section 2, because it is overcome by the substantial dilution of black voting strength that it produces in Hamilton County." *Id.* at 712. As the preceding subsections indicate, our analysis of the totality of the circumstances in Hamilton County does not convince us that a Section 2 violation has even occurred, much less that it is of such severity that it will overcome a state interest we still consider to be legitimate and substantial. *See Cousin*, 46 F.3d at 577. *See also supra* Section III of this opinion and cases cited therein.

We find that the district court's application of the totality of the circumstances test was clearly erroneous. We consider only the effects of past discrimination on blacks' political participation, the fifth "typical" Senate factor, to cut clearly in favor of a finding of vote dilution. However, this one factor, in combination with the others, does not outweigh the significant linkage interest Tennessee has in electing the offices at issue here on an at-large basis. Therefore, even if we had considered the plaintiffs' showing sufficient to meet the three *Gingles* pre-conditions, we would not have found a Section 2 violation under the totality of the circumstances.

V. *CONCLUSION*

We hold that the plaintiffs failed to show that the white majority in Hamilton County votes in such a way as usually to defeat the minority's preferred candidate, and that the plaintiffs thus failed to establish the existence of the third *Gingles* pre-condition. To the contrary, we believe the evidence showed that minority-preferred candidates can and do win election to office in Hamilton County, though no black candidate has ever run for one of the judgeships at issue here. This holding is sufficient to mandate our reversal of this case, even though we also find clear error in the district court's application of the totality of the circumstances test. Accordingly, we would reverse even if we had found that the plaintiffs had met the *Gingles* pre-conditions. Finally, we view both single-member districting and cumulative voting as inappropriate remedies in the context of judicial elections even where a Section 2 violation has been shown. Single-member districting destroys the state's substantial linkage interest in maintaining the coterminous jurisdictional and electoral boundaries of its judges. Cumulative voting, on the other hand, while it preserves the state's linkage interest, is impermissible both because it is designed to achieve purposes in conflict with the spirit of Section 2 of the Voting Rights Act and because it is a particularly inappropriate method for electing members of the judiciary. For all of these reasons, we **REVERSE** the district court's holdings to the contrary and **VACATE** its order imposing cumulative voting in the upcoming elections for Circuit Court, Criminal Court, Chancery Court, and General Sessions Court judges in Hamilton County.

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF TENNESSEE
AT CHATTANOOGA

MAXINE B. COUSIN, *ET AL.*	)	
v.	)	
	)	NO. CIV-1-90-339
NED McWHERTER, *ET AL.*	)	

(Filed Sept. 28, '95)

ORDER

This voting rights action is before the Court on remand from the Sixth Circuit Court of Appeals for specific findings of fact and conclusions of law. Plaintiffs brought this action alleging violations of Section 2 of the Voting Rights Act, 42 U.S.C. § 1973 and the fifteenth amendment of the United States Constitution. Plaintiffs are black adult residents and voters in Hamilton County, Tennessee.

Plaintiffs instituted this action on August 31, 1990. Plaintiffs allege that Hamilton County's use of at-large elections for judges of the Eleventh Judicial Circuit of Hamilton County, Tennessee, and for the judges of the Court of General Sessions in Hamilton County, has a discriminatory result. The plaintiffs seek both declaratory and injunctive relief.

Plaintiffs Maxine B. Cousin, Lorenzo E. Ervin, Jr., Ezra B. Harris, George A. Key, Sr., Buford McElrath, Bobby Ward, Ella Bryant, and Johnny D. Holloway are African Americans, and are registered voters of Hamilton County, Tennessee.

Plaintiffs contend that the at-large, circuit-wide method of electing the nine judges of the Eleventh Judicial Circuit of Tennessee and the three judges of the Court of General Sessions of Hamilton County dilutes the voting strength of African-American residents of Hamilton County in violation of Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, and the first, thirteenth, fourteenth, and fifteenth amendments of the Constitution of the United States. The defendants contend that the state interest in maintaining the method of electing judges with their jurisdiction being coextensive with the electorate outweighs any dilution, and that the plaintiffs are entitled to no relief.

Pursuant to T.C.A. § 16-2-506(11)(A), the Eleventh Judicial Circuit consists of "nine incumbent trial court judges and the district attorney currently residing in [Hamilton] County [who] shall continue to serve the Eleventh Judicial District in their respective capacities." Pursuant to T.C.A. § 16-2-502 "[e]ach trial judge shall continue to be officially known and designated as either a chancellor, circuit court judge, criminal court judge, or law and equity court judge depending upon the provision to which he or she was elected or appointed prior to June 1, 1984."

In Hamilton County there are four Circuit Court judges, three Criminal Court judges, and two Chancery Court judges of the Eleventh Judicial Circuit, and three General Sessions Court judges. All judges are elected at-large, county-wide to eight-year terms. Tenn. Const. Art. VI, § 4; T.C.A. § 17-1-103; 1941 Tenn. Priv. Acts, ch. 6. There is no district or ward residency requirement and candidates must designate the particular division or court

to which they seek election. T.C.A. § 17-1-103; 1984 Tenn. Priv. Acts, ch. 176. Elections of these judges in Hamilton County are partisan.

ELEMENTS OF A SECTION 2 CLAIM

GINGLES FACTORS

In *Thornburg v. Gingles,* 478 U.S. 30, 50-51 (1978), the Court delineates preconditions to establish that multi-member districts operate to impair minority voters' ability to elect representatives of their choice. These factors are

(1) The minority group is sufficiently large and geographically compact to constitute a majority in a single-member district;

(2) The minority group is politically cohesive; and

(3) The white majority votes sufficiently as a bloc to enable it – in the absence of special circumstances, such as the minority candidate running unopposed – usually to defeat the minority's preferred candidate.

In addition, the Court must find a reasonable alternative practice as a benchmark against which to measure the voting practice. *Holder v. Hall,* 129 L.Ed. 687, 695 (1994). A voting practice cannot be challenged as dilutive under Section 2, where there is no objective and workable standard for choosing a reasonable benchmark by which to evaluate a challenged voting practice. *Holder, supra* at 695.

According to the 1990 Census, the population of Hamilton County is 285,536 people, of whom 54,477

(19%) are black. The largest concentration of blacks in Hamilton County is in Chattanooga, the county seat. The population of Chattanooga is 152,466, of whom 51,338 (33.7%) are black. Only 3,139 (5.8%) of the county's blacks live outside Chattanooga. As of October, 1989 there were 140,164 registered voters in Hamilton County, 24,824 (17.7%) of whom were black, 97,306 (69.4%) of whom were white, and 18,034 (12.9%) whose race was unknown. Blacks were 20% and whites were 80% of the 122,130 registered voters whose race was known.

The Court finds that the population of blacks in Hamilton County is sufficiently large and geographically compact so that blacks would constitute a majority in one or more single member districts. The Court also finds that the three and four-seat district configurations submitted by the plaintiffs are "reasonable benchmarks" to evaluate the challenged voting practice in this case. *Holder, supra* at 695.

Based upon a four-seat configuration, corresponding to the number of judges for the Circuit Court of the Eleventh Judicial Circuit, blacks would constitute both population and voting age population (VAP) majorities in one district, and the total deviation among districts would be less than 10%. Plaintiffs have filed a proposed plan for the four districts for the Circuit Court which is further evidence that blacks are geographically compact, because in order to create four districts, there was no need to divide a single existing precinct.

Plaintiffs' submitted plan for four districts is supported by the following chart with the districts shown on Draft 4 which also follows:

Hamilton County, TN

4 Districts 4 Members

District	Total	Black	Total VAP	Black VAP	% Black	% Black VAP	Dev.	%Dev.	# of members
1	73222	3040	56615	2081	4.2%	3.7%	1838	2.57%	1
2	69839	45360	51486	30908	64.9%	60.0%	-1545	-2.16%	1
3	72055	4165	56195	2894	5.8%	5.1%	671	0.94%	1
4	70420	1912	52230	1312	2.7%	2.5%	-964	-1.35%	1
TOTAL	285536	54477	216526	37195	19.1%	17.2%			

MAXIMUM DEVIATION = 4.74%

IDEAL DISTRICT SIZE = 71384 Single-member

Draft 4-District Plan -- Hamilton County, TN 3/1/93
4
3
2
1

Also, based upon a three-seat configuration, corresponding to the number of judges for the Criminal Court and Court of General Sessions, the Court finds that blacks would constitute a majority in regard to voting age population and population in one district, and the total deviation among districts would be less than 10%. Plaintiffs have filed a proposed plan for the three districts for the Criminal Court and Court of General Sessions which is again further evidence that blacks are geographically compact, because in order to create three districts, there was no need to divide a single existing precinct.

Plaintiffs' submitted plan for three districts is supported by the following chart with the districts shown on Draft 3 which also follows:

Hamilton County, TN

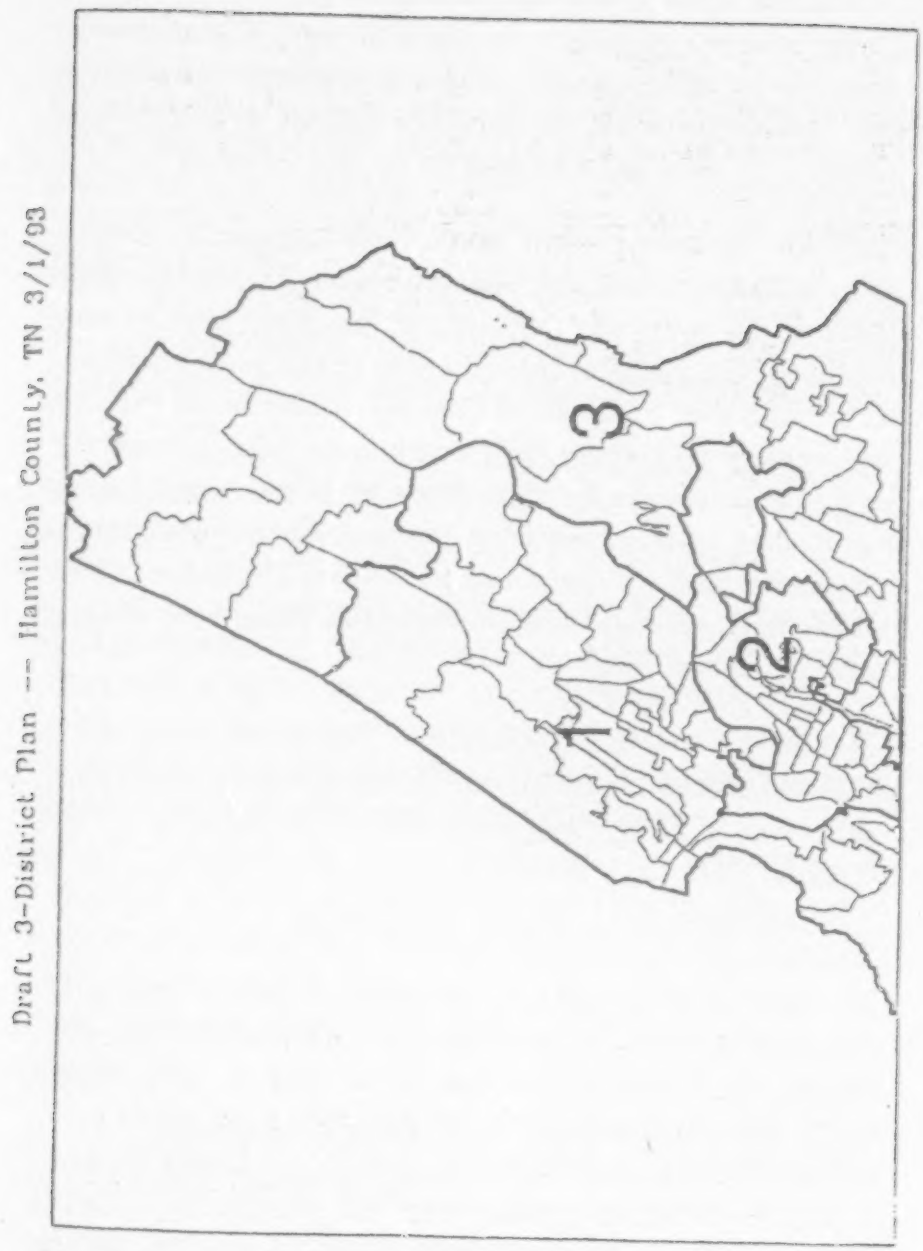
3 Districts 3 Members

District	Total	Black	Total VAP	Black VAP	% Black	% Black VAP	Dev.	%Dev.	# of members
1	98735	2191	74722	1487	2.2%	2.0%	3556	3.74%	1
2	88289	48622	65733	33055	55.1%	50.3%	-6890	-7.24%	1
3	98512	3664	76071	2653	3.7%	3.5%	3333	3.50%	1

TOTAL	285536	54477	216526	37195	19.1%	17.2%

MAXIMUM DEVIATION = 10.98%

IDEAL DISTRICT SIZE = 95179 Single-member


Draft 3-District Plan -- Hamilton County, TN 3/1/93
3
2
1

Based upon a two-seat configuration, corresponding to the number of judges for the Chancery Court, blacks do not constitute a majority in a single-member district, but would constitute an influence district in one district which will be discussed further in this opinion.

The Court also finds the second Gingles precondition, because the Court finds that blacks in Hamilton County are politically cohesive in that they tend to vote as a bloc. The political cohesiveness of blacks in Hamilton County as well as the third Gingles precondition that the white majority votes sufficiently as a bloc to usually enable it to defeat the minority's preferred candidate is established in this case from the racial bloc voting analysis performed by the plaintiffs' expert Dr. Steven Cole. Dr. Cole, stipulated to be an expert in racial bloc voting, testified as follows:

Q. NOW, HAVE YOU IDENTIFIED PLAINTIFFS' EXHIBIT 313?

A. I HAVE.

Q. AND WHAT IS THAT, DR. COLE?

A. THIS IS A SUMMARY OF THE VARIOUS STATISTICAL ANALYSIS – ANALYSES THAT I COMPLETED. IT'S BROKEN UP INTO A NUMBER OF PARTS. THE FIRST PART ARE THE RESULTS OF REGRESSION ANALYSES FOR JUDICIAL CONTESTS, SECOND PART ARE COUNTYWIDE OFFICES ANALYSES OF BOTH HOMOGENEOUS ANALYSES AND ECOLOGICAL REGRESSION, THIRD PART IS A SUMMARY OF HOMOGENEOUS PRECINCT ANALYSES, THE FIFTH PART ARE SOME

TURNOUT ESTIMATES FOR CONTESTS IN HAMILTON COUNTY.

Q. ALL RIGHT. NOW, LET ME DIRECT YOUR ATTENTION TO THE FIRST PART OF YOUR ANALYSIS ON PAGE 1. HOW MANY JUDICIAL CONTESTS WERE THERE AND WHAT WAS THE NATURE OF THOSE CONTESTS?

A. THERE WERE FOUR CITY JUDGE CONTESTS AND THERE WAS A SUPREME COURT CONTEST IN 1980.

Q. AND WHAT IN THE FIRST COLUMN ON THAT PAGE, TELL ME WHAT THOSE PERCENTS REPRESENT?

A. OKAY. THESE ARE – BOTH COLUMNS ARE ESTIMATES FROM REGRESSION ANALYSES. THE FIRST COLUMN ARE ESTIMATES OF THE PERCENTAGE OF AFRICAN-AMERICAN VOTERS WHO VOTED FOR THE AFRICAN-AMERICAN CANDIDATE. IN EACH OF THESE CONTESTS THERE WAS ONE AFRICAN-AMERICAN CANDIDATE. THESE WERE HEAD-TO-HEAD CONTESTS; SO, FOR EXAMPLE, IN 1969 IN THE CITY JUDGE CONTEST INVOLVING THE AFRICAN-AMERICAN CANDIDATE HARRIS, HARRIS RECEIVED 96 PERCENT OF THE VOTE OF AFRICAN-AMERICAN VOTERS.

Q. AND WHAT ABOUT IN THE 1979 CONTEST INVOLVING TIMBERLAKE?

A. IN 1979, THAT CONTEST, TIMBERLAKE RECEIVED 11 PERCENT SUPPORT FROM THE AFRICAN-AMERICAN VOTERS.

Q. AND BROWN 77 PERCENT, IS THAT CORRECT, TO SPEED US UP A LITTLE BIT?

A. THAT'S CORRECT.

Q. AND, DR. COLE, TELL ME NOW WHAT THE PERCENTAGES IN THE SECOND COLUMN ARE?

A. SECOND COLUMN ARE ESTIMATES OF THE PERCENTAGE OF WHITE VOTERS WHO VOTED FOR THE WHITE CANDIDATE OR CANDIDATES.

THE COURT: MR. MCDONALD, WHAT PAGE ARE WE ON?

MR. MCDONALD: PAGE 1, THE FIRST PAGE.

THE COURT: ALL RIGHT, ALL RIGHT.

Q. AND TELL ME AGAIN NOW THE PERCENTAGES SHOW WHAT?

A. OKAY, SIR, THAT FIRST COLUMN IS SUPPORT OF THE AFRICAN-AMERICAN CANDIDATES BY AFRICAN-AMERICAN VOTERS. SECOND COLUMN ARE THE ESTIMATES OF PERCENT OF WHITE VOTERS VOTING FOR WHITE CANDIDATES.

Q. NOW, IS THAT, THAT ESTIMATE OF THE PERCENT, IS THAT BASED ON PRECINCT POPULATION OR VOTING AGE POPULATION OR TURNOUT OR WHAT, DR. COLE?

A. FOR THE CONTESTS PRIOR TO THE LATE 1980'S, THEY'RE BASED ON POPULATION DATA. FOR THE CONTESTS AFTER 1987, I BELIEVE, THEY'RE BASED ON VOTING AGE POPULATION.

Q. ALL RIGHT. WOULD ONE BE IN YOUR VIEW MORE ACCURATE THAN THE OTHER?

A. I WOULD PREFER, I WOULD PREFER TO – THE CLOSER YOU GET TO THE ACTUAL ELECTORAL POOL OF PEOPLE, I PREFER THAT; BUT EXPERTS USE POPULATION DATA ALL THE TIME, AND THOSE I HAD IN – AT TIMES I'VE DONE COMPARISONS OF POPULATION ESTIMATES, VOTING AGE POPULATION ESTIMATES, THOSE BASED ON TURNOUT DATA. FOR EXAMPLE, I DID THAT IN THE RURAL WEST CASE, AND THERE WERE DIFFERENCES OF LESS THAN A PERCENTAGE POINT.

Q. NOW, THE QUESTION OF TURNOUT HAS BEEN RAISED. WAS YOUR METHOD OF ANALYSIS IN THE JUDICIAL CONTEST THE DOUBLE REGRESSION ANALYSIS?

A. IT WAS.

Q. NOW, DOES THE DOUBLE REGRESSION ANALYSIS MAKE IT POSSIBLE TO GENERATE TURNOUT?

A. IT DOES.

Q. CAN YOU JUST TELL ME BRIEFLY HOW THAT WORKS?

A. WELL, YOU GENERATE, YOU GENERATE ESTIMATES OF – YOU BASICALLY DO TWO SETS OF EQUATIONS AND ALGEBRAICALLY COME UP WITH ESTIMATES OF BLACK COHESION AND WHITE CROSSOVER. BY USING PIECES OF THOSE EQUATIONS, YOU CAN GENERATE TURNOUT ESTIMATES. WITH THE SINGLE REGRESSION TECHNIQUE YOU DON'T HAVE THOSE PIECES TO GENERATE THE

TURNOUT ESTIMATES. I GUESS IF I WAS TO GET UP TO THE BOARD AND SHOW YOU THE DIFFERENT COMPONENTS OF THE EQUATION, THAT WOULD BE THE WAY TO DO IT; BUT TO VERBALLY DO IT, I THINK IT WOULD TAKE ME A LITTLE TIME.

Q. DR. COLE, HOW CONFIDENT CAN ONE BE IN THESE ESTIMATES THAT YOU GENERATED SHOWING THE PERCENTAGE OF WHITES AND BLACKS VOTING FOR WHITE AND BLACK CANDIDATES?

A. I THINK WE CAN BE VERY CONFIDENT IN THEIR ACCURACY. THERE ARE A VARIETY OF WAYS OF TRYING TO VALIDATE YOUR FINDINGS. YOU CAN, GIVEN THESE ESTIMATES, GENERATE HOW MANY VOTES EACH CANDIDATE WOULD GET AND GO BACK AND SEE HOW WELL IT COMPARES TO WHAT ACTUALLY HAPPENED. VERY OFTEN IT'S VERY CLOSE, WITHIN A FEW PERCENTAGE POINTS OR TWO. YOU CAN USE OTHER TECHNIQUES LIKE HOMOGENEOUS PRECINCT ANALYSIS, COME UP – USING AN ENTIRELY DIFFERENT METHODOLOGY – COME UP WITH ESTIMATES AND SEE HOW WELL THEY COMPARE, AND VERY OFTEN THEY'RE VERY SIMILAR; SO I'M VERY CONFIDENT, AND EXPERTS IN THE FIELD ARE HIGHLY CONFIDENT. THERE ARE DEBATES ABOUT VERY SPECIFIC ASPECTS OF THE STATISTICAL TECHNIQUES, WHAT KIND OF CONFIDENCE LIMITS YOU HAVE ON THEM, BUT BY AND LARGE WE HAVE A HIGH LEVEL OF CONFIDENCE IN THEIR ACCURACY.

Q. NOW, DID YOU HAVE OCCASION TO GET THE AVERAGE LEVELS OF BLACKS VOTING FOR BLACK

CANDIDATES AND WHITES VOTING FOR WHITE CANDIDATES?

A. I DID.

Q. AND IS THAT CONTAINED ON PAGE 1 OF PLAINTIFF'S EXHIBIT 313?

A. IT IS. IF YOU LOOK AT THE VERY BOTTOM LINE, IF YOU TAKE THE AVERAGE OR THE MEAN OF THE FIVE CONTESTS, YOU COME UP WITH AN AVERAGE BLACK COHESION OF 76 PERCENT; AN AVERAGE LEVEL OF WHITES VOTING FOR WHITES AT 80 PERCENT, OR SAID ANOTHER WAY 20 PERCENT WHITE CROSSOVER.

Q. DO THOSE LEVELS – DO THOSE PERCENTAGES INDICATE ONE WAY OR ANOTHER WHETHER OR NOT BLACKS ARE POLITICALLY COHESIVE IN THOSE JUDICIAL CONTESTS?

A. THEY DO. IN HEAD-TO-HEAD CONTESTS, PROBABLY THE MOST COMMON DEFINITION WOULD BE THAT A MAJORITY OF BLACKS OR AFRICAN-AMERICANS VOTE FOR THE AFRICAN-AMERICAN CANDIDATE. SEVENTY-SIX IS OBVIOUSLY GREATER THAN 50 PERCENT, AND IN THIS SITUATION INDICATES, I WOULD SAY, A SUBSTANTIAL DEGREE OF BLACK COHESION.

Q. BUT WHAT ABOUT THE WHITE COHESION, WHAT DOES THAT PERCENT SAY, IF ANYTHING, ABOUT WHETHER WHITES ARE VOTING AS A BLOC?

A. WELL, A 20 PERCENT CROSSOVER RATE IS A SUBSTANTIAL INDICATION OF, OF LACK OF WHITE SUPPORT FOR AFRICAN-AMERICAN CANDIDATES. I

BELIEVE IN GINGLES THEIR AVERAGE WHITE CROSSOVER WAS CLOSE TO 32 PERCENT. HERE WE HAVE AN AVERAGE OF 20 PERCENT. WHITE CROSSOVER IN GINGLES WAS ONE AND A HALF TIMES GREATER THAN IT IS HERE IN HAMILTON COUNTY IN THESE JUDICIAL CONTESTS.

Q. DOES THIS ANALYSIS INDICATE THAT VOTING IS RACIALLY POLARIZED IN HAMILTON COUNTY OR NOT?

A. IT DOES TO ME.

Q. WELL, WHAT – DO YOU HAVE A DEFINITION OF RACIAL BLOC VOTING, DR. COLE?

A. IN HEAD-TO-HEAD CONTESTS MY DEFINITION AND THE DEFINITION USED IN GINGLES IS THAT WHITE AND AFRICAN-AMERICAN VOTERS VOTE DIFFERENTLY.

Q. AND DOES THE ANALYSIS HERE MEET THAT DEFINITION OR NOT?

A. IT DOES.

Q. NOW, LET ME ASK YOU ABOUT SOME SPECIFIC ELECTIONS. THE 1979 CITY JUDGESHIP INVOLVING TIMBERLAKE, THE AFRICAN-AMERICAN CANDIDATE, IS IT CORRECT THAT HE GOT ONLY 11 PERCENT OF THE BLACK VOTE?

A. THAT'S CORRECT.

Q. WELL, IS THAT FINDING OF YOURS CONSISTENT WITH YOUR PRIOR TESTIMONY THAT BLACKS ARE POLITICALLY COHESIVE?

A. WELL, IN, IN FOUR OUT OF THESE FIVE CONTESTS YOU HAVE THE SITUATION WHERE A MAJORITY OF AFRICAN-AMERICANS VOTED FOR THE AFRICAN-AMERICAN CANDIDATE AND WHITE CROSSOVER WAS LESS THAN 0 PERCENT. I BELIEVE IN THIS CONTEST TIMBERLAKE JUST WASN'T SUPPORTED BY, BY EITHER COMMUNITY. THIS WOULD BE AN ELECTION WHICH I BELIEVE DOES NOT INDICATE RACIALLY POLARIZED VOTING.

Q. IN DOING A POLARIZED VOTING ANALYSIS AS A STATISTICIAN, DO YOU FOCUS ON ONE OR TWO ELECTIONS OR WOULD YOU FOCUS ON THE UNIVERSE OF ELECTIONS OR WHAT, WHAT'S THE MOST RELEVANT APPROACH IN YOUR VIEW?

A. FIRST OF ALL, MOST RELEVANT FOR ME ARE WHITE/BLACK CONTESTS; AND I LIKE TO LOOK AT CONTESTS THAT ARE CLOSEST TO THE ELECTORAL MECHANISM THAT'S BEING CHALLENGED. FOR ME IT'S CRUCIAL TO LOOK AT COUNTYWIDE CONTESTS AND IF POSSIBLE JUDICIAL CONTESTS?

Q. IN LOOKING AT THE JUDICIAL CONTESTS, WHAT'S MORE RELEVANT IN YOUR VIEW, THE AGGREGATE DATA THAT YOU HAVE AT THE BOTTOM OF YOUR TABLE OR ANY ONE PARTICULAR ELECTION?

A. WELL, IN THIS GROUP OF FIVE CONTESTS, THERE'S ONLY ONE CONTEST THAT TAKES INTO ACCOUNT ALL POTENTIAL VOTERS IN THE COUNTY, AND THAT'S THE 1980 SUPREME COURT RACE. THESE OTHER CONTESTS ARE ONLY CITYWIDE CONTESTS; GRANTED, THERE ARE COUNTY

VOTERS THERE, BUT THOSE ARE CITY CONTESTS; SO I WOULD PUT MORE WEIGHT ON THE 1980 SUPREME COURT BROWN RACE.

Q. NOW, IT'S – WOULD YOU TELL ME WHO WON, ACTUALLY WON THE 1969 CITY JUDGE CONTEST INVOLVING JUDGE HARRIS?

A. I BELIEVE HARRIS WON.

Q. AND WHAT ABOUT THE 1991 CITY JUDGE CONTEST INVOLVING JUDGE WILLIAMS?

A. WILLIAMS WON.

Q. WELL, IF BLACKS ARE WINNING, IF BLACKS – WELL, AND THEN TIMBERLAKE LOST IN '79 FOR CITY JUDGESHIP, IS THAT CORRECT?

A. CORRECT.

Q. AND THE MCCLARTY AND TIMBERLAKE RAN UNSUCCESSFULLY IN '82, IS THAT CORRECT?

A. RIGHT.

Q. WELL, IF BLACKS HAVE RUN TWICE IN THOSE CITY CONTESTS, DOESN'T THAT MEAN THAT BLACKS ARE USUALLY ABLE TO ELECT A CANDIDATE OF THEIR CHOICE?

A. I DON'T THINK YOU CAN MAKE THAT SORT OF JUDGMENT. THESE ARE CITY CONTESTS. I BELIEVE THE VOTING AGE POPULATION IN 1990 IN THE CITY IS 36 PERCENT. I BELIEVE IN 1990 THE VOTING AGE POPULATION IN THE – COUNTYWIDE IS 17 PERCENT; SO TO MAKE A JUDGMENT THAT, THAT – LOOKING AT THESE CITY ELECTIONS THAT AN AFRICAN-

AMERICAN COULD WIN COUNTYWIDE IS INAPPROPRIATE.

MR. CATALANO: YOUR HONOR, THE WITNESS IS BEGINNING TO GET INTO WHAT I WOULD CONSIDER TESTIMONY OF A POLITICAL SCIENTIST. I MEAN, WE HAVE NO OBJECTIONS ABOUT HIS TESTIFYING ABOUT WHAT THE STATISTICS ARE AND SO FORTH, BUT HE'S NOW GETTING INTO MAKING JUDGMENT CALLS OF VOTER BEHAVIOR IN CITYWIDE NON-PARTISAN ELECTIONS VERSUS COUNTYWIDE PARTISAN ELECTIONS; AND THEY HAVE PUT ON – ESTABLISHED NO EXPERTISE IN THE FIELD OF POLITICAL SCIENCE, AND WE WOULD OBJECT TO THAT SORT OF TESTIMONY.

THE COURT: WELL, WHAT DO YOU SAY ABOUT THAT?

MR. MCDONALD: WELL, THIS IS JUST A NUMBERS QUESTION THAT I'M ASKING HIM.

THE COURT: I KNOW IT IS. I DON'T KNOW IF YOU NEED TO PROVE IT ANYWAY, MORE PEOPLE VOTING IN THE HAMILTON COUNTY RACES THAN IN THE CITY. THE ONLY PEOPLE VOTE IN THE CITY ARE THE CITY PEOPLE, IS THAT RIGHT, WHERE THE POPULATION OF THE BLACK COMMUNITY IS, PERCENTAGE WISE IS GREATER IN, IN THE CITY AND BY CONTRAST IS LESSER IN THE COUNTY, IS THAT THE POINT YOU WERE –

MR. MCDONALD: YES, SIR.

THE COURT: WELL, I'LL SUSTAIN HIS OBJECTION, AND WE'VE GOT THAT INFORMATION IN.

MR. MCDONALD: OKAY. ALL RIGHT, YOUR HONOR. THANK YOU.

BY MR. MCDONALD:

Q. NOW, BASED ON YOUR ANALYSIS AND YOUR TESTIMONY IN OTHER VOTE DILUTION CASES, ARE YOU ABLE TO QUANTIFY THE LEVEL OF RACIAL BLOC VOTING IN THESE JUDICIAL CONTESTS THAT YOU ANALYZED?

A. THERE ARE A VARIETY OF GUIDELINES THAT EXPERTS USE IN THE FIELD. I THINK WHEN YOU GET TO LEVELS LIKE THIS, EXPERTS WOULD CALL IT OVERWHELMING OR A SUBSTANTIAL AMOUNT OF RACIAL BLOC VOTING. I THINK ONE EXPERT USES A FIGURE IF YOU WERE TO ADD UP BOTH BLACK COHESION AND THE PERCENTAGE OF WHITES VOTING FOR WHITES AND IF IT WAS 160 OR GREATER IT WOULD BE CALLED EXTREME. WE'RE VERY CLOSE TO THAT CRITERION HERE.

Q. NOW, LET'S ASSUME COHESION FOR BLACKS WAS AT THE AVERAGE RATE THAT YOU CALCULATED IN THESE JUDICIAL CONTESTS ABOUT 6 PERCENT, IS THAT CORRECT?

A. CORRECT.

Q. AND LET'S ASSUME THAT THE WHITE CROSSOVER WAS AT THE LEVEL YOU COMPUTED IN PLAINTIFF'S EXHIBIT 313 IN THESE JUDICIAL CONTESTS, THAT IS ABOUT 20 PERCENT IN A COUNTY-

WIDE CONTEST; JUST BASED ON THOSE NUMBERS NOW, ASSUMING EQUAL LEVELS OF WHITE AND BLACK TURNOUT, WOULD A BLACK CANDIDATE WIN IN A BLACK/WHITE JUDICIAL CONTEST?

THE COURT: WAIT, WE'VE GOT AN OBJECTION.

MR. CATALANO: WE'RE GOING TO OBJECT TO THAT QUESTION. THAT'S ASKING FOR AN OPINION OF A POLITICAL SCIENTIST TO EXTRAPOLATE A, A, AN ELECTION FROM A CITYWIDE BASIS TO A COUNTYWIDE BASIS; AND ONCE AGAIN WE WOULD SAY THAT HE HAS NO EXPERTISE IN THAT AREA AND WOULD OBJECT TO HIS – ANY TESTIMONY WITH REGARD TO THAT.

THE COURT: OVERRULED. IT'S NOT A JURY CASE, SO OVERRULED. I'LL LET HIM SAY. YOU MAY ANSWER THE QUESTION.

THE WITNESS: THANK YOU. IT'S A VERY STRAIGHT-FORWARD CALCULATION. WE KNOW THAT COUNTYWIDE VOTING AGE POPULATION IS 17 PERCENT. YOU MULTIPLY THE 17 BY THE BLACK COHESION, ADD THAT FIGURE TO THE 83 PERCENT OF THE VOTERS WHO ARE WHITE TIMES THE 20 PERCENT SUPPORT THAT THEY WOULD GET, YOU'D COME UP WITH A FIGURE THAT WOULD BE FAR LESS THAN WOULD BE NEEDED FOR AN AFRICAN-AMERICAN TO SUCCEED COUNTYWIDE.

BY MR. MCDONALD:

Q. OKAY. NOW, LET'S ASSUME FURTHER THAT THE BLACK COHESION WAS AT THE RATE OF 100 PERCENT, NOT 76 PERCENT, AND THAT THE AVERAGE WHITE CROSSOVER WAS 20 PERCENT; AND ASSUMING EQUAL LEVELS OF BLACK AND WHITE TURNOUT, WOULD THE BLACK CANDIDATE GET THE MAJORITY OF VOTES IN A BLACK/WHITE CONTEST?

A. NOT AT ALL. I THINK, I THINK GIVEN THOSE ASSUMPTIONS, YOU'D COME UP WITH A FIGURE LESS THAN 30 PERCENT.

Q. NOW, HAVE YOU DONE TURNOUT ESTIMATES FOR ANY COUNTYWIDE CONTESTS?

A. I HAVE.

Q. AND LET ME DIRECT YOUR ATTENTION TO PAGES 19 THROUGH 22 OF PLAINTIFFS' EXHIBIT 313. IS YOUR TURNOUT ANALYSIS CONTAINED ON THOSE PAGES?

A. IT IS.

THE COURT: LET ME GET CAUGHT UP WITH YOU THERE.

– WHERE ARE THESE PAGES, WHERE ARE THESE NUMBERS?

MR. MCDONALD: THIS IS THE LAST PART OF THE EXHIBIT, YOUR HONOR, THE LAST FOUR PAGES.

THE COURT: ALL RIGHT.

THE CLERK: IT STARTS ON THE FOURTH PAGE, FOURTH PAGE FROM THE BACK?

MR. MCDONALD: THAT'S CORRECT.

Q. NOW, WERE YOU ABLE TO GENERATE TURNOUT ESTIMATES FOR ANY COUNTYWIDE CONTESTS?

A. I WAS.

Q. AND IDENTIFY THOSE FOR ME, IF YOU WILL.

A. WELL, ON THE FIRST PAGE OF THESE TURNOUT ESTIMATES, THE 1974 DEMOCRATIC PRIMARY ON MAY 3RD, THE REGISTRAR RACE WAS A COUNTY-WIDE RACE. THE AFRICAN-AMERICAN CANDIDATE WAS MAPP, AND THE TURNOUT ESTIMATES IN THAT PARTICULAR CONTEST WERE 10 PERCENT OF THE POPULATION FIGURES FOR AFRICAN-AMERICANS AND WHITES.

Q. AND WHAT FOR WHITES?

A. BOTH 10 PERCENT FOR AFRICAN-AMERICANS AND 10 PERCENT FOR WHITES.

Q. OKAY, AND WHAT WAS THE OTHER ELECTIONS THAT YOU LOOKED AT?

A. ON THE NEXT PAGE THE VERY BOTTOM LINE, THE 1990 DEMOCRATIC PRIMARY MAY 1ST, GARTH'S PUBLIC DEFENDER CONTEST, THE TURNOUT WAS 14 PERCENT OF THE VOTING AGE POPULATION AND 9 PERCENT – THAT WAS 14 PERCENT OF THE AFRI-CAN-AMERICAN VOTING AGE POPULATION AND 9 PERCENT OF THE WHITE VOTING AGE POPULATION.

Q. ALL RIGHT. WHAT ABOUT THE 1990 GENERAL ELECTION?

A. THAT'S ON THE NEXT TO LAST PAGE OF THE EXHIBIT, THAT WOULD BE GARTH'S GENERAL ELECTION ON AUGUST 2ND, AND IN THAT PARTICULAR CONTEST AFRICAN-AMERICANS TURNED OUT AT 10 PERCENT OF THE VOTING AGE POPULATION AND 15 PERCENT OF THE WHITES TURNED OUT. IT WAS 10 PERCENT OF AFRICAN-AMERICANS AND 15 PERCENT OF WHITES.

Q. AND DID YOU LOOK AT ANY OTHER COUNTYWIDE CONTESTS TO DETERMINE TURNOUT? WHAT ABOUT THE 1990 DEMOCRATIC PRIMARY INVOLVING SWAFFORD?

A. YES, I THINK THAT WAS THE LAST ONE. THERE THE FIGURES ARE 19 PERCENT AFRICAN-AMERICAN TURNOUT AND 8 PERCENT WHITE TURNOUT.

Q. NOW, DID YOU DO AN AVERAGE TURNOUT RATE FOR THOSE COUNTYWIDE CONTESTS?

A. I DID.

Q. AND WHAT WERE THE AVERAGE TURNOUT RATES FOR BLACKS AND WHITES?

A. IT WAS 13 PERCENT FOR AFRICAN-AMERICANS AND 11 PERCENT FOR WHITES.

Q. NOW, IF WE APPLY – WERE THOSE ALL THE COUNTYWIDE CONTESTS FOR WHICH TURNOUT COULD BE GENERATED?

A. THAT'S CORRECT.

Q. NOW, APPLYING THOSE AVERAGES TO THE PERCENTAGE OF BLACK AND WHITE CROSSOVER VOTES THAT JUDGE WILLIAMS GOT IN HIS 1991 CITY ELECTION, WOULD HE HAVE WON COUNTYWIDE?

A. NO, HE WOULD NOT HAVE.

Q. WHAT PERCENT OF THE VOTES WOULD HE HAVE GOTTEN?

A. IF YOU DO THOSE CALCULATIONS WITHOUT TAKING TURNOUT INTO, INTO ACCOUNT, HE WOULD HAVE GOTTEN COUNTYWIDE PERCENT OF THE VOTE. IF YOU TAKE INTO ACCOUNT THE – THESE TURNOUT FIGURES, HE WOULD HAVE GOTTEN SOMETHING LIKE 29 PERCENT.

Q. NOW, NOW, I'M ASKING YOU A QUESTION NOT BASED ON YOUR KNOWLEDGE AS A POLITICAL SCIENTIST BECAUSE YOU HAVEN'T BEEN QUALIFIED AS THAT, BUT SIMPLY AS A STATISTICIAN, AS A PERSON WHO ANALYZES VOTER BEHAVIORS STATISTICALLY, BASED ON YOUR STATISTICAL ANALYSIS DO YOU HAVE A JUDGMENT WHETHER BLACK VOTERS GIVEN THE PATTERNS OF RACIAL BLOC VOTING THAT YOU'VE

[TR. 95-108].

In regard to the election of Ardena Garth, the one black candidate who has been elected in a county wide election, Dr. Cole testified as follows:

Q. OKAY. LET'S LOOK AT THE 1990 DEMOCRATIC PRIMARY. IS THAT THE NEXT CONTEST THAT YOU LOOKED AT?

A. IT IS.

Q. AND WHAT PERCENT OF THE BLACK VOTE DID GARTH GET?

A. GARTH GOT 91 PERCENT OF THE BLACK VOTE.

Q. AND WHAT PERCENT OF THE WHITE CROSS-OVER VOTE DID SHE GET?

A. 38 PERCENT.

Q. OF ALL THE CONTESTS THAT YOU'VE ANALYZED SO FAR, IS THAT THE GREATEST PERCENT OF WHITE CROSSOVER VOTE THAT A BLACK CANDIDATE RECEIVED?

A. I BELIEVE SO, I BELIEVE SO.

Q. DO YOU HAVE ANY INFORMATION THAT LEADS YOU TO ACCOUNT FOR THE HIGHER PERCENT OF WHITE CROSSOVER VOTE IN THAT CONTEST?

A. WELL, I KNOW THAT SHE WAS APPOINTED BY THE GOVERNOR, I KNOW SHE WAS AN INCUMBENT.

MR. CATALANO: YOUR HONOR, ONCE AGAIN WE'D OBJECT. HE'S ASKING QUESTIONS DEALING WITH SPECIAL CIRCUMSTANCES.

THE COURT: HE PROBABLY IS. I GUESS THAT'S A QUESTION FOR THE COURT TO DECIDE ONCE I GATHER ALL THE FACTS TOGETHER, SO SUSTAINED.

BY MR. MCDONALD:

Q. ALL RIGHT, SIR. LET'S LOOK AT THE NEXT CONTEST THAT YOU EXAMINED, THE ONE INVOLVING JUVENILE COURT CLERK, IS THAT CORRECT?

A. THAT'S CORRECT.

Q. AND WHAT PERCENT OF THE BLACK VOTE DID SWAFFORD GET?

A. SWAFFORD GOT 74 PERCENT OF THE BLACK VOTE.

Q. AND WHAT PERCENT OF THE WHITE VOTE?

A. 6 PERCENT.

Q. AND HE WON OR LOST?

A. HE LOST.

Q. WHAT KIND OF A STATISTICAL ANALYSIS DID YOU USE IN THAT ANALYSIS?

A. THAT WAS ECOLOGICAL REGRESSION.

Q. AND THE SAME WAS TRUE OF THE GARTH CONTEST?

A. THAT'S CORRECT.

Q. ALL RIGHT, AND LET'S LOOK AT THE LAST CONTEST COUNTY-WIDE THAT YOU ANALYZED, THAT WOULD HAVE INVOLVED GARTH, IS THAT CORRECT?

A. CORRECT.

Q. WHAT PERCENT OF THE BLACK VOTE DID YOU ESTIMATE SHE GOT?

A. SHE GOT ALL OF IT.

Q. AND WHAT PERCENTAGE OF THE WHITE VOTE DID YOU ESTIMATE SHE GOT?

A. 48 PERCENT.

Q. NOW, DID YOU HAVE OCCASION TO DO AN AVERAGE LEVEL OF COHESION BY BLACKS AND AN AVERAGE LEVEL OF CROSSOVER VOTING BY WHITES IN THOSE COUNTYWIDE CONTESTS?

A. I DID. I DID IT BY – I DID SUCH A CALCULATION IN THE HEAD-TO-HEAD CONTESTS.

Q. SO YOU HAD TO EXCLUDE SOME OF THE CONTESTS IN DETERMINING THE AVERAGE LEVELS OF CROSSOVER VOTING AND COHESION?

A. THAT'S CORRECT.

Q. AND WHY IS THAT?

A. THOSE ARE MULTI-CANDIDATE CONTESTS WHERE THERE WERE NON-NUMBERED POSTS; THAT IS PEOPLE COULD VOTE FOR AS MANY AS FOUR CANDIDATES, UNDERSTAND THOSE ESTIMATES ARE NOT CONSISTENT WITH THE KIND OF ESTIMATES YOU'D GET WITH A HEAD-TO-HEAD CONTEST, SO IT WOULD MISLEAD YOU AS TO AVERAGE LEVEL OF COHESION OR WHITE CROSSOVER.

Q. NOW, DID YOU COMPUTE THE AVERAGE LEVEL OF WHITE CROSSOVER VOTING EXCLUDING THE CANDIDACY OF GARTH?

A. YES, I DID THEM BOTH WAYS.

Q. AND WHAT WERE THE FIGURES THAT YOU CAME UP WITH?

A. WELL, FOR, FOR WHITE CROSSOVER, INCLUDING BOTH THE DEMOCRATIC PRIMARY AND GENERAL ELECTION OF GARTH, THE WHITE CROSSOVER ON THE AVERAGE WAS 23 PERCENT. IF YOU EXCLUDED BOTH GARTH CONTESTS, THE WHITE CROSSOVER WOULD BE 10 PERCENT.

Q. NOW, HAS ANY – TO YOUR KNOWLEDGE HAS ANY BLACK CANDIDATE EVER WON AN AT-LARGE COUNTYWIDE CONTEST IN HAMILTON COUNTY?

A. I THINK GARTH IS THE ONLY ONE.

Q. OKAY. NOW, OF THE EIGHT CONTESTS THAT YOU EXAMINED, INCLUDING THOSE INVOLVING GARTH, IN HOW MANY OF THEM DID YOU FIND RACIAL BLOC VOTING?

A. SEVEN OUT OF THE EIGHT.

Q. AND IN HOW MANY OF THOSE CONTESTS WAS THE BLACK CANDIDATE SUCCESSFUL?

A. TWICE.

Q. AND THAT BLACK CANDIDATE OR CANDIDATES WAS WHOM OR WERE WHOM?

A. GARTH.

Q. SHE ACCOUNTED FOR BOTH OF THOSE WINS?

A. THAT'S CORRECT.

Q. NOW, GIVEN THE FACT THAT GARTH WON, WHY ISN'T THAT SIMPLY DISPOSITIVE FROM A STATISTICAL POINT OF VIEW OF THE CONTENTION THAT BLACKS CAN'T WIN AT-LARGE?

A. IF YOU, IF YOU LOOK AT THE – FIRST OF ALL, THERE'S ANOTHER NUMBER HERE THAT I THINK SHOULD BE INCLUDED BEFORE I COMMENT; AND THERE WERE SEVEN CONTESTS THAT WERE EVIDENCED BY RACIAL BLOC VOTING. OF THOSE SEVEN, FIVE, FIVE TIMES AFRICAN-AMERICAN CANDIDATES LOST THROUGH RACIAL BLOC VOTING AND MINORITY VOTE DILUTION. GIVEN THE LEVELS OF WHITE CROSSOVER, I WOULD THINK THAT GIVEN THE AVERAGE LEVELS OF CROSSOVER, I THINK IT WOULD BE VERY DIFFICULT FOR, FOR AN AFRICAN-AMERICAN TO WIN COUNTYWIDE. IT'S NOT IMPOSSIBLE, AS EVIDENCED BY GARTH, BUT I THINK IT WOULD BE EXTREMELY DIFFICULT GIVEN AVERAGE LEVELS OF CROSSOVER.

Q. WELL, WHAT'S THE RELEVANCE OF LOOKING AT THE AVERAGE LEVEL OF CROSSOVER VOTING FROM A STATISTICAL POINT OF VIEW?

A. WELL, YOU'RE LOOKING AT A WIDER RANGE OF ELECTIONS, BOTH IN TERMS OF NUMBER OF ELECTIONS AND OVER TIME.

Q. IN YOUR JUDGMENT WOULD IT BE RELIABLE TO FOCUS JUST ON THE GARTH CONTEST IN DETERMINING WHETHER OR NOT THERE WAS RACIAL BLOC VOTING?

A. I THINK IT WOULD BE MORE RELIABLE TO LOOK AT A WIDER POOL OF ELECTIONS.

[TR 119-124].

The Court specifically **FINDS** that the Garth election is not a reliable measure of racial bloc voting.

In addition, the Court takes judicial notice of racially polarized voting in Hamilton County as set in the following charts which are Appendixes A, B, and C to *Brown v. Board of Com'rs of Chattanooga, Tenn.*, 722 F.Supp. 380, 400-406 (E.D. Tenn. 1989):

APPENDIX A
Chattanooga City Commission
Election Contests
1971-1987

1971

Office/Candidate	% of Vote For	Estimated % of Vote For White	Black	Polarization
PRIMARIES —				
MAYOR:				
Brown	1.4	1.1	2.1	
Crawford	34.8	27.4	47.9	Racially
Days (black)	3.1	−0.5	9.4	Polarized
Walker	57.7	71.7	32.4	
Wright (black)	3.2	0.3	8.3	
FIRE & POLICE COMMISSIONER:				
Kilgore	0.3	0.0	0.9	
Mansfield	9.7	12.5	4.1	Racially
Roberts	47.8	68.7	7.9	Polarized
Shell	0.5	0 1	1.2	
Turner	41.7	18.8	85.9	

Office/Candidate	% of Vote For	Estimated % of Vote For White	Black	Polarization
PUBLIC WORKS COMMISSIONER:				
Carter (black)	1.8	1.3	3.2	
Key (black)	21.9	1.9	63.0	Racially
Rose	70.1	89.7	32.2	Polarized
Snow	6.3	8.8	3.3	
PUBLIC UTILITIES COMMISSIONER:				
Alexander (black)	4.6	0.1	13.2	
Conrad	53.6	47.5	61.5	Racially
Davis (black)	4.1	−0.2	14.9	Polarized
Morgan	16.6	23.9	3.3	
Roth	21.0	28.7	7.0	
EDUCATION & HEALTH COMMISSIONER:				
Franklin (black)	49.0	20.9	94.6	
McAuley	4.7	7.3	1.0	Racially
Petersen	46.3	71.8	4.3	Polarized
RUN-OFFS —				
FIRE & POLICE COMMISSIONER:				
Roberts	52.4	74.5	5.5	Racially
Turner	47.6	25.5	94.5	Polarized
EDUCATION & HEALTH COMMISSIONER:				
Franklin (black)	52.8	27.1	98.9	Racially
Peterson	47.2	72.9	1.1	Polarized
1975				
PRIMARIES —				
MAYOR:				
Brown	0.7	0.7	0.6	
Conrad	26.7	20.5	38.9	Racially
Copeland	4.3	6.1	−0.3	Polarized
Rose	40.3	48.7	8.0	
Turner	28.0	24.0	52.7	
FIRE & POLICE COMMISSIONER:				
Crabtree	1.3	1.3	2.2	
King	0.3	0.2	0.9	Not
Lewis (black)	0.2	0.2	0.5	Racially
Mansfield	32.3	34.4	38.0	Polarized
Poole	1.2	1.2	1.2	
Roberts	64.6	62.7	57.1	
PUBLIC WORKS COMMISSIONER:				
Clark	22.0	23.4	15.8	
DeFriese	18.1	17.9	20.7	Not
Dickerson	16.7	16.1	15.1	Racially
Moore (black)	4.7	2.3	12.2	Polarized
Olgiati	38.6	40.4	36.3	
PUBLIC UTILITIES COMMISSIONER:				
Burnette	2.5	2.8	2.5	
B. Davis	27.5	24.4	37.5	
G. Davis (black)	4.0	−0.1	17.7	

Office/Candidate	% of Vote For	Estimated % of Vote For White	Black	Polarization
Eberle	23.4	27.5	4.3	Racially
Keene	6.8	6.8	4.2	Polarized
McDonald	20.4	22.6	11.7	
Milles	7.3	6.7	5.5	
Samples	8.2	9.5	14.5	
EDUCATION & HEALTH COMMISSIONER:				
Berry	32.9	47.8	0	Racially
Franklin (black)	67.1	52.2	100	Polarized
RUN-OFFS — MAYOR:				
Rose	70.9	78.2	31.4	Racially
Turner	29.1	21.8	68.6	Polarized
PUBLIC WORKS COMMISSIONER:				
Clark	60.3	60.1	59.3	Not Racially
Olgiati	39.7	39.9	40.7	Polarized
PUBLIC UTILITIES COMMISSIONER				
Davis	47.2	39.6	78.2	Racially
Eberle	52.8	60.4	21.8	Polarized

1979

1979

PRIMARIES —

MAYOR:
Rose (unopposed)

FIRE & POLICE COMMISSIONER:				
Dean	9.6	8.2	16.2	
Martin	17.4	16.7	20.5	Racially
Smart	48.7	55.1	23.6	Polarized
Williams	24.2	19.9	39.6	

PUBLIC WORKS COMMISSIONER:				
Adams	25.2	36.0	4.7	
Clark	48.8	57.8	17.4	Racially
Hyde	5.2	5.7	4.3	Polarized
Wright (black)	20.8	0.5	73.6	

PUBLIC UTILITIES COMMISSIONER:				
				Not
Donohoe	21.1	22.1	24.0	Racially
Eberle	78.9	77.9	76.0	Polarized

EDUCATION & HEALTH COMMISSIONER:
Franklin (black) (unopposed)

RUN-OFFS —

FIRE & POLICE COMMISSIONER:				
Smart	63.5	68.5	39.2	Racially
Williams	36.5	31.5	60.8	Polarized

PUBLIC WORKS COMMISSIONER:				
Adams	40.8	39.9	50.2	Racially
Clark	59.2	60.1	49.8	Polarized

Office/Candidate	% of Vote For	Estimated % of Vote For White	Black	Polarization
	1983			
PRIMARIES —				
MAYOR:				
Baty	2.0	1.8	2.9	
Boehm	12.8	12.7	13.1	Not
Fuller	25.6	21.3	36.9	Racially
Roberts	55.8	61.2	41.4	Polarized
Spradley	2.5	2.2	2.8	
Whitener	1.3	0.8	2.9	
FIRE & POLICE COMMISSIONER:				
Hisey	25.9	21.5	37.5	
Kennedy	33.2	40.4	11.8	
Knowles	21.2	17.8	33.3	Racially
Meeks	15.1	15.8	14.2	Polarized
Townson	4.6	4.5	3.3	
PUBLIC WORKS COMMISSIONER:				
Broick	3.5	3.2	4.7	
Clark	52.1	50.3	55.0	Not
Davis	36.7	37.0	37.2	Racially
Hill	3.0	3.5	1.4	Polarized
Hipple	0.5	0.6	0.5	
Igou	4.2	5.3	1.2	
PUBLIC UTILITIES COMMISSIONER:				
Cannon	23.7	24.2	22.3	
Conrad	34.5	27.7	54.3	Racially
Eberle	41.8	48.0	23.4	Polarized
EDUCATION & HEALTH COMMISSIONER:				
Franklin (black)	71.1	59.4	99.2	Racially
Williams	28.9	40.6	0.8	Polarized
RUN-OFFS —				
FIRE & POLICE COMMISSIONER:				
Hisey		23.72	79.51	Racially
Kennedy		76.28	20.49	Polarized
PUBLIC UTILITIES COMMISSIONER:				
Conrad		30.59	71.73	Racially
Eberle		69.41	28.27	Polarized

Office/Candidate	% of Vote For	Estimated % of Vote For White	Black	Polarization
	1987			
PRIMARIES —				
MAYOR:				
Eberle	37.0	39.1	32.0	Not
Roberts	57.9	59.6	52.7	Racially
Sandefur (black)	5.2	1.3	15.3	Polarized
FIRE & POLICE COMMISSIONER:				
Davis	45.4	34.4	74.4	
Kennedy	48.1	64.0	6.0	Racially
Wright (black)	6.5	1.6	19.6	Polarized
PUBLIC WORKS COMMISSIONER:				
Clark		51.67	37.42	
Cramer		2.65	2.69	Racially
Littlefield		44.43	58.36	Polarized
Whitener		1.24	1.53	
PUBLIC UTILITIES COMMISSIONER:				
Freeman (black)	37.3	14.8	94.5	
Rose	54.9	74.3	4.7	Racially
Barzour	7.8	10.9	0.8	Polarized
EDUCATION & HEALTH COMMISSIONER:				
Franklin (black)	79.3	71.4	97.0	Not
Heathington (black)	6.3	8.2	2.7	Racially
Martino	14.4	20.4	0.4	Polarized
RUN-OFFS —				
FIRE & POLICE COMMISSIONER:				
Davis	49.9	31.4	96.7	Racially
Kennedy	50.1	68.6	3.3	Polarized
PUBLIC WORKS COMMISSIONER:				
Clark	44.4	51.2	28.5	Racially
Littlefield	55.6	48.8	71.5	Polarized

APPENDIX B
Chattanooga City Judge
Election Contests
1969–1987

1969

Candidate	% of Vote For	Estimated % of Vote For White	Black	Polarization
Harris (black)	61.4	30.7	96.2	Racially
Hudson	38.6	69.3	3.8	Polarized

Office/Candidate	% of Vote For	Estimated % of Vote For White	Black	Polarization
		1971		
Hargraves	6.1	6.6	6.6	
Meyer	28.5	15.0	56.3	Racially
O'Rear	14.5	13.9	15.7	Polarized
Parks	51.0	64.6	23.3	
		1975		
Cash	33.2	30.9	49.4	Racially
Meacham	66.8	69.1	50.6	Polarized
		1978		
Meyer		* 84.73	77.20	Not Racially
Timberlake (black)		15.27	22.80	Polarized
		1979		
Meyer	61.7	59.4	68.4	Not
Taylor	32.7	37.1	20.8	Racially
Timberlake (black)	5.6	3.6	10.9	Polarized
Brown		* 38.58	75.53	Racially
Cox		61.42	24.47	Polarized
		1982		
McClarty (black)	37.4	15.2	93.4	Racially
Taylor	56.3	76.5	5.7	Polarized
Timberlake (black)	6.3	8.3	0.9	
		1983		
Brock	11.4	12.0	11.1	
Cox	77.0	78.4	73.9	Not Racially
Timberlake (black)	11.6	9.7	15.1	Polarized

APPENDIX C
Other Elections and Referenda

Election/Candidate	% of Vote For	Estimated % of Vote For White	Black	Polarization
1970 REFERENDUM ON CONSOLIDATED GOVERNMENT:				
For	52.2	62.4	11.1	Racially
Against	47.8	37.6	88.9	Polarized
1978 CONSTITUTIONAL AMENDMENT ON REPEAL OF INTERRACIAL MARRIAGE BAN:				
For	61.0	51.0	84.0	Racially
Against	39.0	49.0	16.0	Polarized
1978 REFERENDUM ON ELECTED SCHOOL BOARD:				
Yes	55.1	47.8	82.5	Racially
No	44.9	52.2	17.5	Polarized
1980 SUPREME COURT:				
Drowota	49.0	58.4	22.3	
Brown (black)	42.7	30.4	76.8	Racially
Parrish	8.3	11.2	0.9	Polarized
1984 METRO CHARTER REFERENDUM:				
For	40.9	51.5	11.1	Racially
Against	59.1	48.5	88.9	Polarized
1988 CITY CHARTER (voting by districts—mayor/council form of government):				
For	36.3	30.5	56.1	Racially
Against	63.7	69.5	43.9	Polarized

The Court finds that these findings in the appendixes to *Brown*, also establish the third *Gingles* precondition that the white majority votes sufficiently as a bloc to usually enable it to defeat the minority's preferred candidate.

Although the majority of these charts were city-wide elections, the Court **FINDS** that these races are instructive in regard to racial bloc voting.

RESULTS TEST

In addition to *Gingles* ability to elect test, the nature of a Section 2 violation and the proof required to establish a "results test" is further articulated in the Senate Report that accompanied the 1982 amendments to the Voting Rights Act. Not only does the Senate Report reject the intent test for Section 2 claims, but it also enumerates "typical factors" to help guide the courts in the application of the "results test" as the relevant legal standard. These "typical factors" are set out in *Gingles, supra*, at 36-37 as follows:

> 1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
>
> 2. the extent to which voting in the elections of the state or political subdivision is racially polarized;
>
> 3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, antisingle

shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;

5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

6. whether political campaigns have been characterized by overt or subtle racial appeals;

7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

Additional factors that in some cases have had probative value as part of plaintiffs' evidence to establish a violation are:

whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group;

whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

The Court finds that five of these seven Senate factors are applicable to this case, and are in fact supported by the following undisputed facts the majority of which have been filed and stipulated by the parties.

THE EXTENT OF ANY HISTORY OF OFFICIAL DISCRIMINATION IN THE STATE OR POLITICAL SUBDIVISION THAT TOUCHED THE RIGHT OF THE MEMBERS OF THE MINORITY GROUP TO REGISTER, TO VOTE, OR OTHERWISE TO PARTICIPATE IN THE DEMOCRATIC PROCESS

In 1883 the general assembly enacted a new charter for Chattanooga providing for a system of mandatory voter registration by "age and color," requiring proof of payment of the poll tax as a condition for registration, putting the police force under the control of a commission appointed by the governor, and requiring all city aldermen to be elected at-large but with a ward residency requirement for some aldermen. The purpose of the 1883 charter was to eliminate black office holding. *Brown v. Board of Commissioners of Chattanooga, Tenn.*, 722 F.Supp. 380, 386 (E.D.Tenn.1989).

In 1889 the general assembly enacted a series of laws designed to disfranchise blacks. *Brown, supra* at 386. One of these laws was the "Dortch Law," which required the use of a secret, Australian style ballot. The effect of the law was to impose a literacy test for voting, which had a severe impact on illiterate blacks.

The Dortch Law contained a grandfather clause making it possible for anyone who had voted before 1857 (by definition only whites) to receive assistance with their ballot.

Another law enacted in 1889 was the "Myers Law," which imposed a strict requirement of registration, with racial designation, 20 days prior to each election. The act disfranchised many black voters.

The "Lea Law," also enacted in 1889, provided for separate ballot boxes for state and federal elections. The purpose of the law was to remove state elections and the supervision of white voter fraud from federal oversight.

A fourth law reimposed the requirement of proof of payment of the poll tax as a condition for voting, which had been repealed several years earlier.

In 1901 the general assembly passed a law forbidding even private institutions from educating blacks and whites together.

In 1905 there was a race riot in Chattanooga after whites enforced a new "Jim Crow law" by ejecting all the blacks from a city street car.

During this period of time there was a hardening of white attitudes towards blacks. There were lynchings of blacks in the city in 1885, 1893, 1894, 1906 and 1909, and a lynching in the county in 1897. *Brown, supra* at 386. In 1911 the general assembly enacted a new charter for Chattanooga eliminating ward voting and establishing a Board of Commissioners system of municipal government consisting of a mayor and four commissioners elected at-large.

In addition to abolishing district voting, the 1911 statute contained two other provisions aimed directly at blacks. One prohibited any candidate for municipal office from paying the poll tax of an elector. Another made it a crime for any person to agree to perform any service for any candidate in consideration of anything of value. *Brown, supra* at 387.

THE EXTENT TO WHICH VOTING IN THE ELECTIONS OF THE STATE OR POLITICAL SUBDIVISION IS RACIALLY POLARIZED

The political cohesiveness of blacks in Hamilton County is evident from *Brown, supra,* and the racial bloc voting analysis performed by the plaintiffs' expert in this case, Dr. Steven Cole. Dr. Cole used ecological regression analysis, as well as homogeneous precinct analysis, which is another method for determining the existence of racial bloc.

Ecological regression analysis produces, among other things, estimates of the percent of whites and blacks voting for white and black candidates in particular elections. Regression analysis requires one preliminarily to compute the percent of population (or registered voters or turnout) of each race in each precinct (the horizontal axis), and the percent of the votes for each candidate in each precinct (the vertical axis) for each election analyzed. This data is used as coordinates to plot points on a graph. A line is then drawn which "best fits" the points on the graph. The place at which the line crosses the left vertical axis of the graph can be interpreted as representing the voting pattern in an average precinct with no blacks, while the point at which the line crosses the right vertical axis can be interpreted as representing the voting pattern in an all-black precinct. The "slope of the regression line, or the vertical amount by which the line moves from the left to the right axis, is a measure of how much difference there is in voting patterns between whites and blacks.

Homogeneous precinct analysis, which looks at precincts predominantly (90% or more) of one race, is intuitively easy to understand. If white candidates get most or all, and black candidates get few or no votes in homogeneous white precincts, that is direct evidence that whites in those precincts are voting along racial lines.

In conducting his homogeneous precinct analysis, Dr. Cole took a conservative approach. He assumed that all the votes for black candidates in homogeneous white precincts came from white voters. Thus, his estimates based upon homogeneous precinct analysis show the *minimum* level of white bloc voting that occurred.

Dr. Cole analyzed elections which included county and state elections and recent Chattanooga city elections. Dr. Cole's analysis shows that in elections where voters were presented with a racial choice, voting was demonstrably polarized.

No blacks have run for the Eleventh Judicial Circuit or the Court of General Sessions. However, blacks have run for city court on four occasions, and once for the Supreme Court of Tennessee. Dr. Cole's analysis of these five judicial contests shows that voting is racially polarized. Blacks voted for black candidates at the average rate of 76%, showing that blacks are politically cohesive in black-white judicial elections. Whites voted for white candidates in judicial elections at the average rate of 80%. Stated differently, the average level of crossover voting by whites was 20%. The level of white crossover voting in judicial elections has been steadily *declining* over time. In the 1969 contest for city judge the black candidate got 30.7% of the white vote. In the 1980 contest

for state Supreme Court the black candidate, an incumbent who had been appointed by the governor to fill an unexpired term, got 30.4% of the white vote. In the 1982 contest for city judge the two black candidates got a combined white vote of just 23.5%. In the 1991 contest for city judge the black candidate got only 13% of the white vote.

Based upon the most recent voting patterns the level of racial bloc voting is increasing in Hamilton County making it more difficult than ever for a black to win a county-wide judicial office.

Dr. Cole also analyzed nine county-wide elections from 1966-1990 using either regression analysis (7 elections) or homogeneous precinct analysis (2 elections). Six of the contests were for county offices, *i.e.*, county council, county trustee, public defender, and juvenile court clerk. One of the elections was for the Tennessee Supreme Court, and two were Democratic presidential preference primaries. The average level of cohesion of black voters in the nine county-wide elections was 75%, and the average level of white crossover voting was 17%.

Dr. Cole examined a total of 26 black-white elections from 1966-1993 using regression analysis. In these elections the average rate of black cohesion was 79%. The average level of white crossover voting was 12%. Dr. Cole's aggregate homogeneous precinct analysis confirmed the results of his regression analysis.

The defendants' expert, Dr. Delbert Taebel, agreed that voting in Hamilton County was racially polarized, and that blacks were politically cohesive. However he also testified that the controlling factor in elections in

Hamilton County is party membership rather than race. Dr. Taebel did not consider the 1980 contest for the Tennessee State Supreme Court in his analysis, and in fact this contest disproves this conclusion. In this 1980 election, a black Republican incumbent, *Brown*, who had been appointed by the governor to fill an unexpired term, got 30.4% of the white vote and 76.8% of the black vote for a total of 42.7% of the vote in Hamilton County. Although historically blacks in Hamilton County have voted for the Democratic candidate in this 1980 election, blacks voted for a Republican black candidate, while 69.6% of the white vote went to a white candidate.

In white/white contests a majority of blacks will often vote for the winning white candidate. Although these white candidates are in some sense the choice of black voters, the choice is one which has been a limited choice by the result of various restrictions in the political process.

THE EXTENT TO WHICH THE STATE OR POLITICAL SUBDIVISION HAS USED UNUSUALLY LARGE ELECTION DISTRICTS, MAJORITY VOTE REQUIREMENTS, ANTISINGLE SHOT PROVISIONS, OR OTHER VOTING PRACTICES OR PROCEDURES THAT MAY ENHANCE THE OPPORTUNITY FOR DISCRIMINATION AGAINST THE MINORITY GROUP

Prior to 1941, the Chattanooga board of education was elected at-large in the same manner as the city commission. No blacks were ever elected to the board under the at-large system.

In 1941, a seven member board of education was created with six appointed members, with the seventh

member being the commissioner of education. Citizens in the community were dissatisfied with the appointed board and its lack of neighborhood and minority representation, and launched a campaign in the mid-1970s to establish an elected board using single member districts. The campaign culminated in a referendum election held in 1978. Despite the fact that a majority (52%) of whites voted against an elected board from single member districts, a majority of blacks (89%) voted for the referendum and it passed.

Blacks have regularly been elected to the board of education from the majority black districts.

The Hamilton County Quarterly Court, a predecessor to the current county commission, also used single member district elections. In 1972 three blacks (Greene, Tate, and Kennedy) were elected to the Quarterly Court from the majority black Fourth District.

The Hamilton County Council was created in 1941 to assume many of the duties of the preexisting Quarterly Court, and consisted of the county judge and four council members elected at-large. Although blacks ran for the council (Mapp in 1966; Green in 1974; Mapp, Cotton, and Moore in 1978) no blacks were ever elected under the at-large format.

In 1978 the county commission adopted nine single-member districts following a constitutional amendment requiring counties to use district voting. At the ensuing election, two blacks were elected to the commission (Taylor and McDaniel) from the two majority black districts located within the city of Chattanooga. No blacks have

ever been elected from the seven majority white commission districts.

Under the at-large system of elections formerly used by the City of Chattanooga only one black had ever been elected to the commission. After the at-large system was invalidated under Section 2 on vote dilution grounds, the city adopted a system of district voting. Under the new system of district elections blacks have regularly been elected to the city council.

THE EXTENT TO WHICH MEMBERS OF THE MINORITY GROUP IN THE STATE OR POLITICAL SUBDIVISION BEAR THE EFFECTS OF DISCRIMINATION IN SUCH AREAS AS EDUCATION, EMPLOYMENT AND HEALTH, WHICH HINDER THEIR ABILITY TO PARTICIPATE EFFECTIVELY IN THE POLITICAL PROCESS:

Segregation in the schools at all levels was repeatedly affirmed. Jim Crow laws required segregation in railroad passenger cars, and even in coal mines. These laws were challenged but were held to be constitutional. *Murphy v. Western & A.R.R.*, 23 F. 637 (D.Tenn.1885).

The Chattanooga city commission in the conduct of its business regularly enforced the laws and customs of racial segregation, *e.g.*, authorizing the establishment of a "colored" orphanage in 1922.

In 1942 the state supreme court held that qualified blacks could be denied admission to the College of Law of the University of Tennessee.

The Grand Dragon of the Ku Klux Klan noted in 1946 that there was "a strong Chattanooga Klan."

A five-part, 340-page report by the National Urban League in 1947 documented the continuing existence of segregation in Chattanooga and the depressed socio-economic conditions of blacks. Some of the report's major findings were: housing for blacks was substandard and a majority of blacks were in the lowest income brackets; many black schools were "housed in places that ought to be condemned;" 70% of all working blacks were in the lowest income jobs – service, janitors, porters, and other unskilled categories; 59 of the local labor unions were composed of whites only; most black businesses catered to the needs of blacks that were not met by white establishments, such as barber shops, cleaning establishments, and taxicabs and jitney services; the only city hospital that would admit black doctors for practice was Carver Hospital for Negroes; no city hospital provided nursing training for blacks; segregated health care for blacks was generally inferior and the professional attention scant or inadequate; Erlanger Hospital operated a "colored section" for blacks located in the old part of the building; blacks were excluded from membership on city boards and agency staff positions; children's homes, nursery centers, and orphanages were operated on a racially segregated basis. A black policeman was suspended from the force in 1948 for arresting a white man in violation of department policy. The city commission ratified the suspension over the protests of city blacks.

In 1951 a federal court invalidated segregation at the University of Tennessee, including the College of Law, on the grounds that there was no other state institution at which the plaintiffs could obtain a legal education.

In another decision in 1952 a federal court held that segregation in the public schools was not *per se* in violation of the fourteenth amendment.

When Shepherd Hills in Ridgeside was developed in 1953, subdivision lots were deeded subject to covenants forbidding sale or rental "to any Negro, mulatto, or other person of color . . . [or] to any person of Jewish or Hebrew blood."

The Men's Civic League issued a report in 1954 in which it charged that the wings of Erlanger Hospital to which black patients were assigned were "overrun by vermin" and were "completely unfit for human beings." The hospital administrator acknowledged that the board was aware of the bad conditions.

Musical events at the city auditorium in Chattanooga were customarily segregated on the basis of race. When a black took a seat in the "whites only" section during a dance in 1956, a fight broke out. The manager recommended that the board adopt a policy barring whites from black dances and barring blacks from white dances.

In 1957, after the Southern Coach Lines removed the segregated seating signs from its buses following a Supreme Court ruling that the segregation was unlawful, someone placed a dummy on the Walnut Street bridge on which was written "All NAACP bus riding niggers."

Two dynamite explosions were set off within one week in 1958 at the Phillis Wheatley Branch of the YWCA for Negroes. Hotels, train stations, drinking fountains, and city parks were all racially segregated.

Blacks were not employed in administrative positions in Chattanooga city government until 1962. The first black to be hired at city hall worked in the finance department as a clerk-typist, the lowest classification in the department. The City of Chattanooga did not open all city operated facilities to blacks until 1963. When the City of Chattanooga hired its first black bus driver in the 1960s, whites tried to intimidate him and someone shot at the bus he was driving. The University of Chattanooga was operated on a racially segregated basis until 1965. Erlanger Hospital did not desegregate its facilities until the government threatened to cut off federal funds in 1966. When the hospital's board agreed to sign a certificate of compliance with the Civil Rights Act of 1964, the president of the board resigned in protest. Blacks picketed the Chattanooga city hall in 1975 calling for equality in employment, housing, and treatment.

In 1984 a predominately black organization, Concerned Citizens, was founded to address problems of racism and police brutality in Hamilton County. Concerned Citizens has conducted prayer vigils and circulated leaflets providing information about the alleged victims of police brutality.

Churches and ministerial alliances in Hamilton County are largely segregated.

Blacks in Hamilton County had a higher risk of mortality when compared to whites for 10 of the 15 principal cause of death for 1980.

Public housing in Hamilton County is owned and operated by the Chattanooga Housing Authority (CHA). The CHA was established in 1938 to take advantage of

the Housing Act of 1937, and to provide low rent housing to low income residents of the city. Housing projects were planned and constructed by the CHA, and were occupied, on a racially segregated basis, including College Hill Courts for blacks in 1941, and East Lake Courts for whites in 1940. Boone-Hysinger Homes, occupied in 1953, was exclusively white, while McCallie Homes, Poss Homes, and Emma Wheeler Homes, built in 1953, 1963, and 1964 respectively, were occupied exclusively by blacks.

After the National Urban League cited the CHA for segregation in public housing in 1964, a CHA official said that we "have always been segregated and we have never had any complaints."

Most of the projects administered by the CHA remain racially segregated to the present time: *e.g.*, Emma Wheeler Homes (98% black); Scattered Sites (97% black); Mary Walker (99% black); Maurice Poss Homes (99% black); S.J. McCallie Homes (98% black); and Harriet Tubman (90% black).

Public housing has been opposed by segments of the Hamilton County population at various times and for various reasons. In the 1940's many viewed public housing as "encroaching socialism" and unfair competition with the private sector. More recently, the City of Chattanooga rezoned a parcel of land in the Hickory Valley Road area from multi-family to single family use at the request of local whites who were opposed to the construction of a federally assisted multi-family housing project on the land. The NAACP challenged the city's rezoning decision in federal district court in 1979 as being

racially discriminatory. In 1981 the court approved a consent decree in which the city agreed not to interfere with the development and construction of public housing, and to purchase the Hickory Valley Road property and deed it to the developers for construction of multi-family housing units.

Pupils in the city schools were completely segregated on the basis of race. Only black teachers and principals were assigned to the black schools, and only white teachers and principals were assigned to the white schools. The administrative staff of the school system was all white. County teacher associations were segregated.

The district court entered orders in 1962, 1965, 1967, and 1971 providing for desegregation of city schools by grades and limited busing of some elementary and junior high school students. Some 2,000 whites filed a suit in state court and secured an order enjoining the city from making available any funds for transportation of school students "to achieve a racial balance within the Chattanooga public school system." City officials voted "to comply with that order without appeal." The school board filed a motion seeking "the instructions" of the district court. The mayor and city commissioners were joined as defendants and the district court vacated the order of the state court. Many whites responded to desegregation by leaving the public schools.

During the desegregation of city schools there were racial incidents and confrontations throughout the late 1960s and early 1970s. City police were required to quell one disturbance at Brainerd High in 1970 as whites and blacks caused a near riot.

In 1975 the federal court approved a plan for desegregation of city schools even though Howard High School and Riverside High School were 99% black. According to the court of appeals, resegregation had occurred but it was the result of "a more subtle and lingering malaise of fear and bias in the private sector which persisted after curative action had been taken to eliminate the dual system itself."

The school desegregation litigation was dismissed by the court in 1986 on the basis that the board had implemented a plan ordered by the court, and that any segregation in the city schools was not a result of board action.

In 1988, 22 of the 52 schools in the city system were racially identifiable (90% or more of one race), *e.g.* Brainerd High School (94% black); Howard High School (99% black); Hixson High School (93% white); Lookout Valley High School (98% white); St. Elmo (95% black); Alton Park (92% black); Donaldson (91% black); Dalewood (94% black); Woodmore (98% black); *etc.* Approximately one-half of all students attended schools that were 90% or more of one race.

Blacks in Hamilton County, as a result of past and continuing discrimination in education, employment, and other areas, have been isolated from the economic and political main stream. They remain a socioeconomically depressed minority with a limited ability to fund and mount political campaigns.

The per capita income of whites in Hamilton County in 1989 was $15,134.00; for blacks it was $7,381.00.

In Hamilton County in 1989, 16.2% of whites and 31.2% of blacks had income below the poverty level. According to the 1990 Census, in Hamilton County 4.8% of whites and 10.9% of blacks were unemployed. According to the 1990 Census, in Hamilton County 69.3% of whites and 40.4% of blacks owned their own homes.

THE EXTENT TO WHICH MEMBERS OF THE MINORITY GROUP HAVE BEEN ELECTED TO PUBLIC OFFICE IN THE JURISDICTION

No African-American has ever been elected as a Circuit Court, Criminal Court, or Chancery Court judge of the Eleventh Judicial Circuit in Hamilton County or a General Sessions Court judge for Hamilton County.

There are blacks in Hamilton County who have the necessary qualifications to be judges and chancellors of the Circuit Court and the Court of General Sessions, *i.e.*, who are 30 years of age and who are members of the bar. T.C.A. §§ 17-1-101, 17-1-106.

Although blacks won two of the city judicial elections, no black has ever won a majority of the votes in a county-wide judicial contest.

In the 1969 election for city judge, Harris, a black, got 96% of the black vote. His white opponent got 69% of the white vote. Despite the high level of racial bloc voting, Harris won, in part because overall voter turnout was low (20.5% of VAP), and black turnout was exceptionally high (30% for blacks compared to 15% for whites).

In the 1991 city judge election, Williams, a black, got 100% of the black vote, while his white opponent got 87%

of the white vote. Black voter turnout was higher than white voter turnout and Williams was elected.

Although blacks ran for the Hamilton County Council (Mapp in 1966; Green in 1974; Mapp, Cotton, and Moore in 1978) no blacks were ever elected under the at-large format. In the 1978 county council election, the three black candidates ran first among black voters and last among white voters. Blacks have run for other county-wide offices as well. Mapp, a black, ran for county trustee in 1968 and was defeated. Mapp ran for county register in 1974 and again was defeated.

In the 1990 county-wide primary for juvenile court clerk, Swafford, a black, got 74% of the black vote. His white opponent got 74% of the white vote and won the election. Swafford ran for the Chattanooga city council in 1993 in a majority black district and was elected, beating the incumbent and getting 56% of the total vote.

After the complaint was filed in this case, Ardena Garth was elected public defender in 1990, the first black ever to be elected to a county-wide office in Hamilton County. The position of public defender was created in Hamilton County in 1989. The job of the public defender is to provide legal representation to indigent persons charged with crimes.

The Governor of Tennessee, defendant McWherter, appointed Ms. Garth as the first public defender of Hamilton County as part of an announced affirmative action plan. Ms. Garth ran as the incumbent in the elections in 1990.

The voting in both Ms. Garth's primary and general elections was racially polarized. In the primary Ms. Garth got 91% of the black vote, while her white opponent got 62% of the white vote. In the general election, Ms. Garth got 100% of the black vote and her opponent got 52% of the white vote.

SUPPLEMENTAL SENATE FACTORS

Additional factors that in some cases have had probative value as part of plaintiffs' evidence to establish a violation are:

WHETHER THERE IS A SIGNIFICANT LACK OF RESPONSIVENESS ON THE PART OF ELECTED OFFICIALS TO THE PARTICULARIZED NEEDS OF THE MEMBERS OF THE MINORITY GROUP;

The Court affirms and adopts the defendants' findings of fact in regard to this factor which are as follows:

The Circuit Court, Chancery Court, Criminal Court and General Sessions Court Judges of Hamilton County are responsive to the particularized needs of members of the black community in Hamilton County inasmuch as these judges are fair and impartial in the disposition of matters before them.

Specifically, there is no proof that any of the present judges have discriminated against any African-Americans who have been involved in the judicial process as plaintiffs, defendants, attorneys, jurors, or witnesses.

Although the Court requested from the State a comparison of sentencing ranges from black and white defendants, the State declined to provide these statistics, maintaining the position that these figures were not available.

There is no proof that the establishment and maintenance of the present judicial system in Hamilton County was in any way a pretext for diluting minority voting rights.

WHETHER THE POLICY UNDERLYING THE STATE OR POLITICAL SUBDIVISION'S USE OF SUCH VOTING QUALIFICATION, PREREQUISITE TO VOTING, OR STANDARD, PRACTICE OR PROCEDURE IS TENUOUS

The State contends that it has a vital interest in the at-large election of the separate circuit court, chancery court, criminal court and general sessions court judges in Hamilton County. The State contends that the method of electing these judges with their jurisdiction being coextensive with the electorate is a strong factor weighing in favor of finding no violation under Section 2 of the Voting Rights Act in this case.

The defendants contend that any of the alternative mechanisms for electing judges in Hamilton County proposed by the plaintiffs would undermine this vital state interest. The State contends that the subdistrict election of judges would destroy the State's interest in ensuring that the electorate and jurisdiction of each judge are coextensive. A limited or cumulative voting scheme would undermine the judicial system by fostering the creation of

particular non-geographic constituencies to which judicial candidates would respond.

The Court finds as a matter of law that this policy underlying the practice of linkage in the election of judges is a substantial state interest. League of United Latin Amer. *Citizens v. Clements*, 999 F.2d 831, 871 (5th Cir.1993). In *LULAC* at 876-877, the Court did not find that vote dilution outweighed the state interest, because the Court found that in six of the nine counties involved that the minority-preferred candidate did not lose "on account of race," but rather due to partisan affiliation unaffected by racial politics.

However, in this case, the Court finds that under the totality of the circumstances as set out above utilizing the *Gingles* preconditions and the Senate factors, that Tennessee's state interest in at-large elections will not suffice to overcome a violation of Section 2, because it is overcome by the substantial dilution of black voting strength that it produces in Hamilton County. *Houston Lawyers' Assn. v. Atty. Gen.*, 115 L.Ed.2d 379, 387 (1991), *LULAC*, at 876. The Court specifically finds that based upon the evidence as a whole, as set out herein, that minority-preferred candidates do lose "on account of race" and not due to any particular partisan affiliation.

ABILITY TO INFLUENCE CLAIM

As stated in *Gingles, supra*, at 47, "[t]he essence of a Section 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives."

Significantly, n. 12 of *Gingles* states as follows:

> The claim we address in this opinion is one in which the plaintiffs alleged and attempted to prove that their ability *to elect* the representatives of their choice was impaired by the selection of a multimember electoral structure. We have no occasion to consider whether § 2 permits, and if it does, what standards should pertain to, a claim brought by a minority group that is not sufficiently large and compact to constitute a majority in a single-member district, alleging that the use of a multimember district impairs its ability *to influence* elections.
>
> We note also that we have no occasion to consider whether the standards we apply to respondents' claim that multimember districts operate to dilute the vote of geographically cohesive minority groups that are large enough to constitute majorities in single-member districts and that are contained within the boundaries of the challenged multimember districts, are fully pertinent to other sorts of vote dilution claims, *such as a claim alleging that the splitting of a large and geographically cohesive minority between two or more multimember or single-member districts resulted in the dilution of the minority vote.* (emphasis added).

Based upon the qualifying language of n. 12, the Court finds that *Gingles* three pre-conditions applies only to claims by minorities that multimember electoral structures impair their ability to elect, and that because this case also involves a single at-large district which allegedly impairs their ability to influence, that the absence of *Gingles* preconditions is not fatal to the claim of the plaintiffs that multimember electoral structures

also impair their ability to influence an election in regard to a two-seat configuration, corresponding to the number of judges for the Chancery Court, even though blacks would not constitute a majority in a single-member district.

The Court finds that to allow an "ability to influence" claim would not undermine *Gingles*, because *Gingles* at n. 12 clearly indicates that the only type of claim before the Court is a Section 2 claim that plaintiffs' ability *to elect* has been impaired by the selection of a *multimember* electoral structure. Therefore, the Court finds that *Gingles* preconditions are inapplicable to the plaintiffs' claim in this case that the manner in which an at-large district impairs their ability *to influence*.

To apply the *Gingles* requirement that a minority must be able to show that it would constitute a majority in any type of district to all challenges to electoral systems is tantamount to a holding that there can be no purely *influence* claims, because the minority must meet a threshold showing that they have the ability to *elect*. The Court finds that *Gingles* clearly does not encompass such a holding, but in fact, expressly reserves the criteria for an influence claim and/or for challenges to other districts for a later day.

The Court also notes that the Senate Report as previously cited herein expressly directs an inquiry into whether or not the totality of the circumstances indicates that the voting strength of minority voters has been "minimized or cancelled out." This is clearly inclusive of an influence type claim such as the plaintiffs have alleged in this case. The Court also finds it significant that the

legislative history of Section 2 as set out in this Senate Report makes no requirement that a minority establish that it constitutes a majority in a district in order to prevail in a Section 2 claim.

The Court finds that based upon the totality of the circumstances as set out herein, although blacks do not constitute a majority in a single-member district based upon a two-seat configuration, corresponding to the number of judges for the Chancery Court, blacks would constitute an influence district. Modifying the plaintiffs' four district plan into a two district plan, it is apparent that if districts 1 and 2 are combined this results in one district which will have a 30 percent black voting age population. Therefore, the Court finds that use of a single-district plan clearly minimizes and impairs the ability of the minority to influence the outcome of an election, while use of two districts would serve to minimize the inequality now present in the opportunity to elect by black and white voters in regard to the judges from the Chancery Court.

CONCLUSION

The Court finds that the plaintiffs have met the three *Gingles* preconditions, and that in regard to the four seat configuration as well as the three seat configuration proposed by the plaintiffs, plaintiffs have shown a reasonable benchmark to evaluate the challenged voting practice because they have shown the ability to elect Circuit, Criminal, and General Sessions Judges. The Court also finds that the challenged voting practice substantially dilutes the plaintiffs' opportunity to participate in

the electoral process. In addition, the Court finds that based upon the totality of the circumstances, including the presence of five of the seven Senate factors in this cause, the plaintiffs have shown that the result of the use of a single at-large district in regard to the election of Circuit Court Judges, Criminal Court Judges, General Sessions Judges, and Chancellors in Hamilton County dilutes the effectiveness of the minority vote, and which results in a substantial abridgment of the right of the minority to vote. *Armour v. State of Ohio*, 775 F.Supp. 1044 (N.D.Ohio 1991). The Court finds that under the facts of this case that the minority plaintiffs have been denied equal access to the political process, *Chisom v. Roemer*, 115 L.Ed.2d 348 (1991), and that the proof of substantial vote dilution shown by the totality of circumstances in this case, overcomes the defendants' substantial state interest in linkage. *LULAC, supra* at 876.

However, recognizing the substantial state interest in linkage involved, the Court suggests that the defendants are not limited, insofar as a remedy to this Voting Rights Act violation is concerned, to a system of districting such as was suggested by the plaintiffs, but may pursue a non-district remedy such as cumulative voting. As stated by Justice O'Connor, concurring in part and concurring in judgment,

> In principle, cumulative voting and other non-district-based methods of effecting proportional representation are simply more efficient and straightforward mechanisms for achieving what has already become our tacit objective: roughly

> proportional allocation of political power according to race.

Holder, supra at 714.

This is the second opinion written by this Court on the same record. The Court has attempted to write a definitive opinion setting out the reasoning in finding that these plaintiffs are entitled to prevail. The Court has also observed in the courtroom the presence of the African-American plaintiffs and African-Americans who have run for public office in Hamilton County, knowing they had no chance to win, fighting hard to participate in the political process in Hamilton County in a meaningful way, trying to change the system so that they would have a reasonable expectation of being allowed to have some opportunity of success in elections. From all of the above, the Court strongly **FINDS** that the plaintiffs in this case are justly entitled to the redress sought.

Accordingly, it is hereby **ORDERED** that the Tennessee State Legislature will have ninety (90) days from the date hereof to submit a proposed plan to the Court to remedy this Voting Rights Act violation.

ENTER:

/s/ Thomas G. Hull
THOMAS G. HULL
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
AT CHATTANOOGA

MAXINE B. COUSIN, *ET AL.*	)	
	)	NO. 1:90-CV-339
v.	)	
	)	
DON SUNDQUIST, *ET AL.*	)	

(Filed Jul. 3, '96)

ORDER

This voting rights action is before the Court to address the remedy phase of this matter. Courts must generally defer to legislative judgments pertaining to basic political policy, regardless of whether such decisions may be perceived to be less than optimal, and as long as such decisions fall within the confines of the U.S. Constitution and federal law. *Upham v. Seamon*, 456 U.S. 37, 40, 102 S.Ct. 1518, 1520, 71 L.Ed.2d 725 (1982). Therefore, courts are first required to give the appropriate legislative body an adequate opportunity to devise an acceptable remedial plan before implementing measures of their own. *See, White v. Weiser*, 412 U.S. 783, 794-95, 93 S.Ct. 2348, 2354-55, 37 L.Ed.2d 335 (1973).

PROCEDURAL BACKGROUND

The Court initially allowed defendants ninety days, or until December 27, 1995, to submit a proposed remedial plan. *Id.* at 714. Subsequently, that date was extended twice by the Court so that the final date for submission of a proposal became May 1, 1996.

In attempting to formulate a remedy as directed by the Court, on January 23, 1996 the Tennessee legislature filed Senate Bill 2807, and on January 24, 1996, House Bill 2596. Both bills read as follows:

> AN ACT to amend Tennessee Code Annotated, Title 16, Chapter 2, relative to election of certain judges.
>
> BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:
>
> SECTION 1. Tennessee Code Annotated, Title 16, Chapter 2 is amended by adding the following sections as a new, appropriately designated part.
>
> SECTION 2. (a) In counties having a population of not less than two hundred eighty-five thousand (285,000), nor more than two hundred eighty-six thousand (286,000), according to the 1990 federal census or any subsequent federal census, the courts of general sessions, probate and all other state trial courts of record shall be divided into specific divisions substantially according to population.
>
> (b) The four (4) judges for the circuit court shall be elected from four (4) single member divisions. The three (3) judges for the criminal court and the three (3) judges for the court of general sessions shall be selected from three (3) single member divisions. The two (2) judges for the chancery court shall be elected from two (2) single member divisions.
>
> (c) There shall be no division residency requirement and all judges shall exercise jurisdiction countywide and as provided by state law.

SECTION 3. All judges shall be subject to countywide midterm retention elections. Judges retained by a majority of the votes cast shall serve the remainder of their terms. If a judge is not retained by a majority of the votes cast, a special election shall be called as soon as practicable to fill the unexpired term of such judge's office. A judge who is not retained shall not be eligible to be a candidate in any special midterm election but shall remain in office until such persons successor is duly elected and takes the oath of office.

SECTION 4. (a) Prior to February 1, 1998, and at least every ten (10) years thereafter, following a federal decennial census, the county legislative body of a county affected by the provisions of Section 2 shall apportion each court division for the general sessions courts of such county so that the apportionment of each such division shall be substantially according to population. The county legislative body shall use the latest federal census data whenever a reapportionment is made.

(b) Prior to February 1, 1998, and at least every ten (10) years thereafter, following a federal decennial census, the Tennessee general assembly shall apportion each court division for the criminal, chancery, circuit, and other courts of record of each county to which Section II applies so that the apportionment of each such division shall be substantially according to population. The general assembly shall use the latest federal census data whenever a reapportionment is made.

(c) Each division shall be reasonably compact and contiguous and shall not overlap.

(d) Upon application of any citizen of the judicial district affected, the Tennessee court of appeals shall have original jurisdiction to review the appointment and shall have jurisdiction to make such orders and decrees amending the apportionment to comply with this section, or if the county legislative body or general assembly, respectively, fails to make the apportionment, shall make a decree ordering an apportionment.

SECTION 5. In the alternative, all judges of a county or state trial court in such counties shall be elected countywide, using either limited or cumulative voting.

SECTION 6. This act shall take effect upon becoming a law, the public welfare requiring it.

Shortly thereafter on February 22, 1996, the office of the Tennessee Attorney General issued Opinion No. 96-203, which provided that the subdistricting of the general sessions and trial courts in Hamilton County, such as provided for by Senate Bill 2807, would violate Article VI, Sections 4 and 5 of the Tennessee Constitution. The opinion states that Bill 2807 would violate Section 4 because the judges would not be elected from the same geographic area over which they exercise jurisdiction. Further, the opinion states that Bill 2807 fails to provide for a district attorney from each subdistrict for each criminal court but that under Section 5, district attorneys must be elected from the same geographic area as the criminal court to which they are assigned. Section 5 of Senate Bill 2807 provides for the alternative remedy of a "cumulative or limited voting" process for the election of the judges at

issue in this case. There were no findings from the Attorney General that Section 5 of Senate Bill 2807 would violate the Tennessee Constitution.

After having passed in the House Judiciary Committee on April 25, 1996, the House of Representatives of the Tennessee legislature adopted the following amendment proposing cumulative voting, which failed to pass the House on this same date:

> HA1488, Amendment 1-0 to HB2596 by deleting all language after the enacting clause and by substituting instead the following:
>
> SECTION 1. Beginning with the August 1998 regular election and every eight (8) years thereafter, the judges of the circuit court of the eleventh judicial district shall be elected by cumulative voting. Under this method of voting, the four (4) candidates receiving the highest number of votes for the office of circuit court judge of the eleventh judicial district shall be declared the winners of the four (4) circuit court judge positions. Voters in this election shall be permitted to cast four (4) votes in any manner they choose for the candidates on the ballot or for write-in candidates. Accordingly, the polling machines in Hamilton County shall be modified so as to permit this voting procedure by the August 1998 election.
>
> SECTION 2. Beginning with the August 1998 regular election and every eight (8) years thereafter, the judges of the criminal court of the eleventh judicial district shall be elected by cumulative voting. Under this method of voting, the three (3) candidates receiving the highest number of votes for the office of criminal court

judge of the eleventh judicial district shall be declared the winners of the three (3) criminal court judge positions. Voters in this election shall be permitted to cast three (3) votes in any manner they choose for the candidates on the ballot or for write-in candidates. Accordingly, the polling machines in Hamilton County shall be modified so as to permit this voting procedure by the August 1998 election.

SECTION 3. Beginning with the August 1998 regular election and every eight (8) years thereafter, the judges of the chancery court of the eleventh judicial district shall be elected by cumulative voting. Under this method of voting, the two (2) candidates receiving the highest number of votes for the office of chancery court judge of the eleventh judicial district shall be declared the winners of the two (2) chancery court judge positions. Voters in this election shall be permitted to cast two (2) votes in any manner they choose for the candidates on the ballot or for write-in candidates. Accordingly, the polling machines in Hamilton County shall be modified so as to permit this voting procedure by the August 1998 election.

SECTION 4. Beginning with the August 1998 regular election and every eight (8) years thereafter, the judges of the general sessions court of Hamilton County shall be elected by cumulative voting. Under this method of voting, the three (3) candidates receiving the highest number of votes for the office of general sessions court judge of the eleventh judicial district shall be declared the winners of the three (3) general sessions court judge positions. Voters in this election shall be permitted to cast three (3)

votes in any manner they choose for the candidates on the ballot or for write-in candidates. Accordingly, the polling machines in Hamilton County shall be modified so as to permit this voting procedure by the August 1998 election.

SECTION 5. If additional judgeships are created for the circuit court, criminal court or chancery court for the eleventh judicial district or for the general sessions court of Hamilton County after August 1998, those judges shall be included in the cumulative voting process at the next regular term election for such judges beginning in August, 2006. If additional judgeships are created for the general sessions court of Hamilton County before August, 1998, those judges shall be included in the cumulative voting process at the next regular term election for such judges beginning in August, 1998.

SECTION 6. All other acts, public or private, and any provisions of Tennessee Code Annotated that are in conflict with this act are hereby repealed.

SECTION 7. If any provision of this act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to that end the provisions of this act are declared to be severable.

SECTION 8. This act shall not take effect during the pendency of an appeal of the decision of the United States District Court for the Eastern District of Tennessee in *Cousin v. Sundquist*, No. 90-CV-339, which hold the at-large election of the circuit, criminal and chancery

> court judges of the eleventh judicial district and the general sessions court judges of Hamilton County to violate section 2 of the Voting Rights Act, before the United States Court of Appeals for the Sixth Circuit or the Supreme Court of the United States. If a final decision is rendered in favor of the defendants in this case resulting in its dismissal, then this law shall never take effect. If a final decision is rendered in favor of the plaintiffs in this case before January 1, 1998, then this law shall take effect on January 1, 1998. If a final decision is rendered in favor of the plaintiff after January 1, 1998, then this law shall take effect upon the date of that final decision.

On June 19, 1996, the defendants filed "Position of Defendants Regarding Remedy," which stated that they would take no position as to the remedy that this Court should impose. On June 20, 1996, the plaintiff filed a proposed remedy that essentially incorporated the language of the original Senate Bill 2807 and House Bill 2596, with an additional component of the creation of two interim judgeships.

Where, as in this case, the opportunity has been given to the legislature and no legally acceptable remedial plan has been proffered, then "the responsibility falls on the District Court" to exercise its discretion in fashioning an acceptable remedial scheme. *Chapman v. Meier,* 420 U.S. 1, 27, 95 S.Ct. 751, 766, 42 L.Ed.2d 766 (1975).

REMEDY ANALYSIS

In Hamilton County there are four circuit court judges, three criminal court judges, and two chancery court judges of the Eleventh Judicial Circuit, and three

general sessions court judges. All judges are elected at-large, county-wide to eight-year terms. Tenn. Const. Art. VI, § 4; T.C.A. § 17-1-103; 1941 Tenn. Priv. Acts, ch. 6. There is no district or ward residency requirement and candidates must designate the particular division or court to which they seek election. T.C.A. § 17-1-103; 1984 Tenn. Priv. Acts, ch. 176. Elections of these judges in Hamilton County are partisan.

This Court previously found in the order entered on September 28, 1995 that the plaintiffs met the three *Gingles*[1] preconditions, and that in regard to the four seat configuration as well as the three seat configuration subdistrict proposed by the plaintiffs, plaintiffs have shown a "reasonable benchmark" to evaluate the challenged voting practice, because they have shown the ability to elect circuit, criminal, and general sessions judges. *Holder v. Hall*, 512 U.S. ___, 129 L.Ed.2d 687, 695, 114 S.Ct. 2581 (1994).

Although subdistricts were utilized as a "benchmark" for the purpose of measuring vote dilution, the Court is not restricted to utilizing subdistricts as the remedy for this vote dilution. The Court finds the analysis of Circuit Judge Hatchett, dissenting in *SCLC v. Sessions*, 56 F.3d 1281, 1302 (11th Cir. 1995), to be persuasive:

> Thus, the first two *Gingles* factors require the existence of a hypothetical "benchmark" for the purpose of measuring vote dilution; they do not

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[1] *Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986).

> require a "remedy," something completely different. Indeed, Justice O'Connor articulated the difference between the two in *Holder*, explaining that an "alternative benchmark is often self-evident. In a challenge to a multi-member at-large system, for example, a court may compare it to a system of multiple single-member districts. . . . *Though there may be disagreements about the precise appropriate alternative practice in these cases, there are at least some objectively determinable constraints on the dilution inquiry.*" *Holder*, ___ U.S. at ___, 114 S.Ct. at 2589-90 (O'Connor, J. concurring) (citations omitted) (emphasis added). In other words, the first two preconditions merely contemplate an objective basis used to assess the vote dilution inquiry; they do not contemplate a "remedy," or the "precise appropriate alternative practice" that will ultimately be implemented.

Therefore, the Court finds that a comparison of the alternative practices of subdistricting and cumulative voting as proposed in the original Senate Bill 2807 and House Bill 2596 is appropriate in this case.

I. SINGLE-MEMBER DISTRICTS

Despite a great deal of criticism, single-member districting continues to be the most frequently employed judicial remedy for unlawfully discriminatory at-large voting systems. Proponents of the system have supported it for a variety of reasons. Single-member districting is an effective method for creating a subdistrict where a racial minority constitutes a majority of voters, thus providing the minority voters with the ability to elect a candidate of

their choice. Unlike cumulative voting, single-member districts do not threaten to destroy judge collegiality because all judges are not forced to run against each other upon seeking reelection. *Nipper v. Smith*, 39 F.3d 1494, 1545 (11th Cir. 1994). Additionally, single-member districting does not discourage qualified candidates from running for office due to fears of facing all of the incumbent judges at once *Id.* at 1545-46.

Single-member districts do, however, have some severe disadvantages. Because their constituency is restricted to smaller, compact population segments, judges may also become more susceptible to capture by narrow local interests. *See* Daniel R. Oritz, *Alternative Voting Systems as Remedies for Unlawful At-Large Systems*, 92 Yale L.J. 144, 153-54 (1982). The votes of minority citizens who live outside a safe-district are effectively nullified so that such voters would receive virtual representation but not actual representation. *Id.* at 145. Single-member districts would also force the court to racially subdivide despite the Supreme Court's recent warnings about the "social and political costs of dividing communities along racial lines in the name of improving electoral systems." *Uno v. City of Holyoke*, 72 F.3d 973, 992 (1st Cir. 1995). *Accord Cane v. Worcester County, Md.*, 35 F.3d 921, 925 (4th Cir. 1994), *cert. denied*, 115 S.Ct. 1097 (1995). *See e.g., Shaw v. Reno*, ___ U.S. ___, ___, 113 S.Ct. 2816, 2832, 125 L.Ed.2d 511 (1993). The significant interest that a state has in maintaining linkage between the electorate and the trial judges is defeated by single member districting because the judges exercise jurisdiction over the entire county but are elected by only a fragment of the voters.

Finally, because a districting plan such as Senate Bill 2807 would violate the Tennessee Constitution as discussed in Tenn. Op. Att'y Gen. No. 96-023, the State legislature would be powerless to revise it. Therefore, the court would be responsible for maintaining the legality of the plan as the population composition changes over time. Such responsibility would foster further litigation each time the perception of vote dilution arose, thus needlessly occupying the court's time and expending the State's resources. For the court to alter the plan to allow for a district attorney for each subdistrict would be equally unavailing since the judges must be "elected by the qualified voters of the district or circuit to which they are assigned" and not from subdistrict. TENN. CONST. art. 6 § 13.

II. Cumulative Voting

A system employing cumulative voting, however, would not cause the complex problems associated with single-member systems. A scheme such as the one outlined in HA1488, Amendment 1-0 to HB2596 would not be violative of the Tennessee Constitution and would thus not require judicial intervention each time a change must be made to the system. Additionally, cumulative voting prevents the court form having to consider population variation entirely when fashioning a remedial scheme. *See Dillard v. Chilton County Comm'n*, 669 F.Supp. 870, 876, *aff'd*, 868 F.2d 1274 (11th Cir. 1989). The system reduces the likelihood that future vote dilution complaints will be filed since the system operates irrespective of population variance.

Because the system is a county-wide system, it does not at all interfere with the State's substantial interest in linkage. The votes of all citizens will be of equal significance since no voters will be arbitrarily excluded from their corresponding district, i.e., representation will be actual, not virtual. 92 Yale L.J. at 154. Finally, since redistricting lines never have to be drawn, there can be no allegation of discrimination resulting from districts drawn solely on the basis of race. Minority voters "will have an opportunity to elect a candidate of their choice, but that opportunity will not come at the expense of geographical diversity, the division of municipalities, or racial segregation." *Cane v. Worcester County, Md.*, 874 F.Supp. 687, 694 (D. Md. 1995) *enforcing* 35 F.3d at 973.

REMEDIAL PLAN SELECTED

It has remained the State's position that it has a vital interest in the at-large election of the separate circuit court, chancery court, criminal court and general sessions court judges in Hamilton County. The State contends that the method of electing these judges with their jurisdiction being coextensive with the electorate is a strong factor, and that the subdistrict election of judges would destroy the State's interest in ensuring that the electorate and jurisdiction of each judge are coextensive. The Court has found as a matter of law that this policy underlying the practice of linkage in the election of judges is a substantial state interest. *League of United Latin Amer. Citizens v. Clements*, 999 F.2d 831, 871 (5th Cir. 1993).

The Court finds that the advantages of cumulative voting as set out herein outweigh the advantages of utilizing subdistricts as the appropriate remedial scheme. Therefore, recognizing the substantial state interest in linkage involved, the Court finds that the non-district remedy of cumulative voting is the more efficient and straightforward mechanism for achieving "roughly proportional allocation of political power according to race." *Holder*, 512 U.S. ___, 129 L.Ed.2d at 714, 114 S.Ct. at 2601. (Thomas, J., joined by Scalia, J., concurring).

POTENTIAL REMEDIAL COMPONENT OF SPECIAL ELECTION

Plaintiffs originally filed this suit on August 31, 1990. They have now been pursing relief from this voting rights violation for nearly six years. This creates the question of whether a special election should be ordered as a remedial component of the remedy implemented by the Court.

Federal courts do have the power to invalidate elections under conditions which are violative of the Constitution. *Hadnott v. Amos*, 394 U.S. 358, 367, 89 S.Ct. 1101, 1106, 22 L.Ed.2d 336 (1969). The courts, however, are not required to exercise this power for every case held under an unconstitutional statute. *Conner v. Williams*, 404 U.S. 549, 550, 92 S.Ct. 656, 657-58, 30 L.Ed.2d 704 (1972). When deciding upon an appropriate remedial measure for an election held pursuant to an unconstitutional statute, courts should rely on equitable principles. *Reynolds v. Simms*, 377 U.S. 533, 585, 84 S.Ct. 1362, 1393-94, 12 L.Ed.2d 506 (1964).

There is no "all-encompassing list of factors which a court must consider in determining whether to order special elections." *Gjersten v. Board of Election Com'rs*, 791 F.2d 472, 479 (7th Cir. 1986). The court must consider the "integrity of the electoral system" and the "necessities of the process of governing" in each case. *Id.* at 479.

A special election called as a remedial measure has been characterized as an "extraordinary remedy which the courts should grant only under the most extraordinary of circumstances." *Smith v. Paris*, 257 F.Supp. 901, 905, *modified*, 386 F.2d 979 (5th Cir. 1967). By reaching into the state political process, a federal court implicates "important concerns of federalism and state sovereignty" and should "not resort to this remedy until it has carefully weighed all equitable considerations." *Gjersten*, 791 F.2d at 478.

By the time any reasonable date the court could set for a special election would arrive, there would be less than two years remaining before the upcoming general election. The burdensome cost of campaigning and the significant election expenses placed on the candidates and the county by having two elections in less than a two year period are excessive in light of the short time frame which remains for the plaintiffs to be accorded relief. Furthermore, the changes to the Hamilton County judiciary brought about by a special election would be very difficult to undo if the judgment of the district court is reversed on appeal. The cost of returning to the previous state of judicial affairs would be enormous, both in monetary terms and expended voter effort. Campaign expenditures which have already been spent would have to be incurred again. There may be no possibility at all of

returning the present judges to the bench or of making them whole if the Sixth Circuit reverses this Court's judgment.

After carefully weighing all equitable considerations, including but not limited to, the detriment to the concerns of the state, the voters, and the candidates, and any benefit received from a special election, the Court finds that the equities balance against utilizing a special election as a remedial component. For the aforementioned reasons, the court will not order a special election for the judges of the Eleventh Judicial Circuit of Tennessee.

CONCLUSION

Based on the foregoing reasons, utilizing HA1488, Amendment 1-0 to HB2596, it is hereby **ORDERED** as follows:

Beginning with the August 1998 regular election and every eight (8) years thereafter, the judges of the circuit court of the eleventh judicial district shall be elected by cumulative voting. Under this method of voting, the four (4) candidates receiving the highest number of votes for the office of circuit court judge of the eleventh judicial district shall be declared the winners of the four (4) circuit court judge positions. Voters in this election shall be permitted to cast four (4) votes in any manner they choose for the candidates on the ballot or for write-in candidates. Accordingly, the polling machines in Hamilton County shall be modified so as to permit this voting procedure by the August 1998 election.

Beginning with the August 1998 regular election and every eight (8) years thereafter, the judges of the criminal court of the eleventh judicial district shall be elected by cumulative voting. Under this method of voting, the three (3) candidates receiving the highest number of votes for the office of criminal court judge of the eleventh judicial district shall be declared the winners of the three (3) criminal court judge positions. Voters in this election shall be permitted to cast three (3) votes in any manner they choose for the candidates on the ballot or for write-in candidates. Accordingly, the polling machines in Hamilton County shall be modified so as to permit this voting procedure by the August 1998 election.

Beginning with the August 1998 regular election and every eight (8) years thereafter, the judges of the chancery court of the eleventh judicial district shall be elected by cumulative voting. Under this method of voting, the two (2) candidates receiving the highest number of votes for the office of chancery court judge of the eleventh judicial district shall be declared the winner of the two (2) chancery court judge positions. Voters in this election shall be permitted to cast two (2) votes in any manner they choose for the candidates on the ballot or for write-in candidates. Accordingly, the polling machines in Hamilton County shall be modified so as to permit this voting procedure by the August 1998 election.

Beginning with the August 1998 regular election and every eight (8) years thereafter, the judges of the general sessions court of Hamilton County shall be elected by cumulative voting. Under this method of voting, the three (3) candidates receiving the highest number of votes for the office of general sessions court judge of the eleventh

judicial district shall be declared the winners of the three (3) general sessions court judge positions. Voters in this election shall be permitted to cast three (3) votes in any manner they choose for the candidates on the ballot or for write-in candidates. Accordingly, the polling machines in Hamilton County shall be modified so as to permit this voting procedure by the August 1998 election.

If additional judgeships are created for the circuit court, criminal court or chancery court for the eleventh judicial district or for the general sessions court of Hamilton County after August, 1998, those judges shall be included in the cumulative voting process at the next regular term election for such judges beginning in August, 2006. If additional judgeships are created for the circuit court, criminal court, chancery court, or general sessions court of Hamilton County before August, 1998, those judges shall be included in the cumulative voting process at the next regular term election for such judges beginning in August, 1998.

This Remedial Plan shall be effective immediately and shall be utilized in any countywide election for a judgeship position held hereafter.

ENTER:

/s/ Thomas G. Hull
THOMAS G. HULL
UNITED STATES
DISTRICT JUDGE

96-6028

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MAXINE B. COUSIN, ET AL., Plaintiff-Appellee,	)	ORDER
v.	)	
DON SUNDQUIST, ET AL., Defendants-Appellants.	)	

(Filed Jul. 10, 1998)

BEFORE: WELLFORD, NORRIS, and BATCHELDER, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

42 U.S.C. § 1973. Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

Supreme Court, U.S.
FILED
DEC 28 1998
OFFICE OF THE CLERK

No. 98-598

In The

Supreme Court of the United States

October Term, 1998

MAXINE B. COUSIN, et al.,

Petitioners,

v.

DON SUNDQUIST, Governor of Tennessee, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW[1]

1. Whether the Court of Appeals erred in holding that the District Court should have considered white/white contests for the judicial offices in question on the issue of whether the petitioners met the *Gingles* third pre-condition, *i.e.*, "whether the white voting bloc usually defeated the black-preferred candidates" in trial judge elections, when there were no black/white elections for such offices.

---

[1] It is the position of the respondents that the petitioners have incorrectly ordered the "Questions Presented for Review". The first two questions as listed by the petitioners pertain to whether single-member districts or cumulative voting are legally available remedies upon a finding of vote dilution under § 2 of the Voting Rights Act in judicial election cases. Before considering whether these issues merit plenary review, this Court should first consider whether the following two holdings of the Court of Appeals merit the granting of a petition for writ of certiorari: (1) the petitioners failed to establish the third precondition under *Thornburg v. Gingles*, 478 U.S. 30, 106 S. Ct. 2752, 92 L. Ed. 2d 25 (1986); and (2) the petitioners failed to establish under the "totality of the circumstances" that the at-large election of trial and general sessions court judges of Hamilton County, Tennessee violates § 2 of the Voting Rights Act. *Cousin v. Sundquist*, 145 F.3d 818, 826 and 834 (6th Cir. 1998)("Because the third pre-condition is not satisfied, the plaintiffs' vote dilution claim in this case must fail" and "We find that the district court's application of the totality of the circumstances test was clearly erroneous.") Furthermore, the Court of Appeals' discussion of whether single-member districts is a remedy that can be imposed for a § 2 violation is dicta since that remedy was not even imposed by the district court. *Id.* at 827 ("Even if we had held plaintiffs' vote dilution claim valid, we would not have affirmed a remedy such as they [the plaintiffs] proposed in this case.")

QUESTIONS PRESENTED FOR REVIEW – Continued

2. Whether the lower court erred in its totality of circumstances analysis under Section 2.

3. Whether the Court of Appeals erred in ruling that Section 2 precluded the use of a non-district based remedy, *i.e.*, cumulative voting, for county-wide judicial elections in light of the "substantial" state interest in a coextensive electorate and jurisdiction for such courts.

4. Whether the Court of Appeals erred in ruling that single-member districts could not be used as a remedy for county-wide judicial elections in light of the "substantial" state interest in a coextensive electorate and jurisdiction for such courts.

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OPINIONS BELOW

The opinion of the Court of Appeals is reported as *Cousin v. Sundquist*, 145 F.3d 818 (6th Cir. 1998). The order of the Court of Appeals denying the petitioners' suggestion for rehearing *en banc* and the petition for rehearing on July 10, 1998, is unreported, but it is contained in the Appendix to the Petition for Writ of Certiorari. App. 121. The opinion of the District Court dated September 28, 1995, is reported as *Cousin v. Sundquist*, 904 F. Supp. 686 (E.D. Tenn. 1995). The order of the District Court dated July 3, 1996, imposing cumulative voting as a remedy in this case is unreported, but it is contained in the Appendix to the Petition for Writ of Certiorari. App. 103.

JURISDICTION

The Court of Appeals entered its judgment on June 1, 1998, and denied the petitioners' timely suggestion for rehearing *en banc* and petition for rehearing on July 10, 1998. The petition for writ of certiorari was timely filed; therefore, the jurisdiction of this Court to consider the petition is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, provides:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or

political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

STATEMENT OF THE CASE

This case concerns whether the election of trial court and general sessions court judges[2] in Hamilton County,

[2] The trial court judges in Hamilton County include two chancellors, three criminal court judges and four circuit court judges. For purposes of trial courts, the State of Tennessee is divided into 31 judicial districts. Hamilton County comprises the Eleventh Judicial District. Unlike other states, Tennessee has

Tennessee on a county-wide basis to correspond to the jurisdiction of each of these courts violates § 2 of the Voting Rights Act. For the sake of brevity, respondents will recount only those facts essential for this Court to determine that plenary review is unnecessary and that denial of the petition for writ of certiorari is appropriate.

1. Procedural History – The petitioners filed this lawsuit on August 31, 1990. *Cousin v. McWherter*, 840 F. Supp. 1210 (E.D. Tenn. 1994). After a period of discovery and denial of the respondents' Motion for Summary Judgment, the District Court held a trial in November 1993. *Id.* In January 1994, the District Court issued a memorandum opinion finding that the election of trial and general sessions court judges in Hamilton County, Tennessee violated § 2. *Id.* However, that opinion did not specifically discuss the *Gingles* preconditions in its analysis, and the District Court dismissed the state's interest in a coextensive electorate and jurisdiction for trial courts as "nebulous at best." *Id.* The District Court then later issued an order "enjoining the State from conducting any further at-large elections and ordered the State to submit an election plan in compliance with the Voting Rights Act." *Cousin v. McWherter*, 46 F.3d 568 (6th Cir. 1995).

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retained to a large extent its historical tradition of specialized courts. The chancery courts hear primarily equity matters; the criminal courts hear only criminal matters; and the circuit courts hear primarily law matters. There are five general sessions court judges elected county-wide in Hamilton County. The general sessions court in Tennessee is a court of limited jurisdiction hearing civil matters where the amount in controversy is under $15,000 and criminal matters involving misdemeanors or preliminary hearings.

On respondents' appeal, the Court of Appeals vacated the injunction and remanded the case to the District Court with the following instructions:

> On remand, the district court is to determine the presence or absence of the three Gingles preconditions which plaintiffs must necessarily prove in order to establish their vote dilution claim; and if the court finds those preconditions do exist, to consider the totality of the circumstances in order to determine whether, in the context of all those circumstances, a Section 2 violation has occurred.

Id. at 577.

As to the state's interest in a co-extensive electorate and jurisdiction, the Court of Appeals held that the District Court's "characterization of that interest as 'nebulous at best' " in fact "constitute[d] legal error" and instructed the District Court to weigh that interest, which according to the Court of Appeals is "substantial," as follows:

> On remand, the district court must weigh this substantial state interest against evidence bearing on the factors indicative of vote dilution. The state's interest is only one factor to be considered in evaluating the totality of the circumstances. It does not automatically outweigh proof of racial vote dilution. However, because the state's interest is a substantial one, the plaintiffs must produce evidence supporting the dilution claim sufficient to carry their burden of outweighing the state's interest.

Id.

On remand, the District Court issued an opinion on September 28, 1995, again holding that the election of trial court and general sessions court judges in Hamilton County, Tennessee, violates § 2. *Cousin v. Sundquist*, 904 F. Supp. at 714. This time the District Court found that: (1) the petitioners had established all three *Gingles* pre-conditions, *id.* at 688-704; (2) the petitioners had proven a violation of § 2 under the "totality of the circumstances test", *id.* at 704-13; and (3) although the State's interest in a co-extensive jurisdiction and electorate for trial and general sessions court judges in Hamilton County, Tennessee, was "substantial," it did not outweigh a finding of vote dilution under § 2. *Id.* at 713-14. The respondents again appealed. The Court of Appeals reversed the decision of the District Court on a number of alternative grounds. *Cousin v. Sundquist*, 145 F.3d 818 (6th Cir. 1998).[3]

2. ***Gingles* Pre-Conditions** – The Court of Appeals began its analysis with the *Gingles* pre-conditions which require a plaintiff to establish the following before considering whether under the "totality of the circumstances" there is a violation of § 2:

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[3] These alternative grounds include: (1) the District Court erred in holding that the petitioners had established the third *Gingles* pre-condition, *Cousin v. Sundquist*, 145 F.3d at 826; (2) the District Court erred in finding a violation under the "totality of the circumstances" test when considering the state's substantial interest in linking the electorate to jurisdiction in the election of trial and general sessions court judges in Hamilton County, Tennessee, *id.* at 834; and (3) "[e]ven if we [the Court of Appeals] had held plaintiffs' vote dilution claim valid, we would not have affirmed a remedy such as they proposed in this case because it is at odds with the important state interest in 'linkage.' " *Id.* at 827.

> [1] the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district. . . . [2] the minority group must be able to show that it is politically cohesive. . . . [and 3] the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate.

Thornburg v. Gingles, 478 U.S. at 50-51, 106 S. Ct. at 2752.

The Court of Appeals found that the District Court erred in concluding that the petitioners had met the third pre-condition, and, therefore, concluded that it "need not conduct a detailed inquiry into the first factor, the geographic compactness of blacks in Hamilton County, for a Section 2 claim cannot proceed unless all three Gingles pre-conditions are satisfied." *Cousin v. Sundquist*, 145 F.3d at 823.[4] The facts about the *Gingles* third pre-condition relate to expert testimony analyzing various elections to determine whether the white voting bloc votes usually to defeat the black-preferred candidate. None of the parties or the lower courts dispute the accuracy of the statistical regression analysis performed by the petitioners' and the respondents' experts in estimating how black and white voters voted. Rather the dispute concerns which elections are the most relevant in the analysis. The cause of the disagreement is due at least in part to the fact that no

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[4] As to the second pre-condition, the Court of Appeals noted that the "state concedes, and uncontroverted evidence at trial showed, that blacks in Hamilton County vote sufficiently cohesively to satisfy the second Gingles pre-condition." *Cousin v. Sundquist*, 145 F.3d at 823.

black lawyer has ever run for trial court judge or general sessions court judge in Hamilton County, Tennessee.

The petitioners' expert considered only black/white elections in his analysis. He first considered judicial contests in Hamilton County and the City of Chattanooga, which is located wholly in Hamilton County. Between 1969 and 1991, there were 4 contested elections for city judge in the City of Chattanooga with the black-preferred candidate prevailing in 3 of the 4 elections.[5] In the election for state supreme court judge in 1980, the black-preferred candidate, who is black, was defeated by the white candidate in Hamilton County. In addition, the petitioners' expert looked at 29 other black/white elections on a county-wide and city-wide basis. None of these elections were for any of the offices in question. From these elections, the petitioners' expert calculated that "the average black cohesion was 76% and the average white cohesion 80% . . . " *Cousin v. Sundquist*, 145 F.3d at 824. Based on these figures, the petitioners' expert concluded and the District Court agreed that the white voting bloc in Hamilton County votes usually to defeat the black-preferred candidate in judicial elections. *Cousin v. Sundquist*, 904 F. Supp. 691-704.

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[5] The petitioners state in their Petition that in 2 of the 4 city judge elections, the black candidate prevailed. Petition for Writ of Certiorari, p. 4. However, the petitioners fail to state that, in the 1982 election for city judge, the black-preferred candidate, Meyer, who is white, prevailed over the black-candidate, Timberlake. *See* Trial Exhibit 313.

On the other hand, the respondents' expert considered the following criteria in determining which elections to analyze:

> Dr. Taebel [the respondents' expert] chose his group of elections according to: (1) their 'recency,' under which criterion he limited his inquiry to elections taking place in the last ten years; (2) their relevance, by which he limited himself to elections that were county-wide and partisan, as are elections for the Hamilton County judgeships at issue here; and (3) their contestedness by which he eliminated elections in which the losing candidate received less than 15% of the vote.

Cousin v. Sundquist, 145 F.3d at 824.

The respondents' expert identified 32 elections between 1982 and 1992, of which 12 involved lawyer-qualified offices, *i.e.*, all of the judicial offices in Hamilton County along with the district attorney general and public defender for the county. Only one election analyzed by the petitioners' expert involved a black and white candidate – the 1990 general election for public defender. The Court of Appeals summarized the results of these elections as follows:

> Dr. Taebel's analysis indicated that the minority's preferred candidate prevailed in seven of the 12 lawyer-qualified elections and in 16 of the 20 exogenous elections. Dr. Taebel's figures also showed that in four of the minority-preferred candidate's seven victories in the lawyer-qualified elections, and in nine of the minority preferred candidate's 16 victories in the exogenous elections, that candidate defeated the preferred candidate of the white majority. . . . Given these

> conclusions, Dr. Taebel opined that the white majority did not regularly vote in such a way as to deprive black voters in Hamilton County of the opportunity to elect their preferred candidate.

Id.

3. Totality of the Circumstances

a. History of Discriminatory Efforts to Limit Black Voting – The petitioners state that the district court found "significant examples of public and private discrimination" including "routine segregation in virtually all aspects of life well into the 1960s; past and continuing *de jure* and *de facto* segregation in public housing, public schools, law enforcement, employment, health care, social services; and violence directed at blacks." Petition for Writ of Certiorari, pp. 7-8. As to the first Senate Factor, the District Court made no such findings. Rather, the District Court recounted the history of voting discrimination against blacks in Tennessee and in particular Hamilton County from 1883 through 1911. *Cousin v. Sundquist*, 904 F. Supp. at 705-06.

b. Extent of Racially Polarized Voting – The respondents have previously agreed that blacks vote cohesively; however, as the Court of Appeals noted "the outcome of even a racially polarized election does not always disfavor minority voters, a result which does not support a claim of vote dilution." *Cousin v. Sundquist*, 145 F.3d at 832.

c. Suspect Electoral Practices or Procedures – The Court of Appeals rejected the District Court's conclusion that Hamilton County comprises an unusually and

impermissibly large electoral district for the judicial offices in question noting that "Hamilton County is not unusually large in comparison to other judicial districts in Tennessee." *Id.*

d. Denial of Opportunity to Run for Office – The Court of Appeals found that the parties agree that there is no slating process for judicial offices in Hamilton County and that "the lack of a slating process or other obstacle to candidacy cuts against a finding of vote dilution." *Id.*

e. Effects of Past Discrimination on Political Participation – The Court of Appeals did not disturb the District Court's finding that African Americans in Hamilton County are a "socioeconomically depressed minority with a limited ability to fund and mount political campaigns." *Id. See also Cousin*, 904 F. Supp. at 710.

f. Overt or Subtle Racial Appeals in Political Campaigns – The petitioners assert that there have been overt and/or subtle racial appeals in recent political campaigns in Hamilton County referring to instances involving the 1993 election for the Mayor of Chattanooga and the 1990 public defender's election. Petition for Writ of Certiorari, p. 10. Furthermore, the petitioners imply that the District Court made such a finding. That implication is misleading in that the District Court made no finding whatsoever on this factor as noted by the Court of Appeals. *Id. See also, Brown v. Board of Commissioners of Chattanooga*, 722 F. Supp. 380, 396 (E.D. Tenn. 1989) ("Chattanooga has for the most part been spared both overt and subtle racial appeals in elections".)

g. Extent to Which Blacks Have Been Elected – The Court of Appeals acknowledged that no black has ever been elected as a trial court judge or general sessions court judge in Hamilton County but noted two important facts: (1) "no black has ever run for a county judgeship . . . " *Cousin v. Sundquist*, 145 F.3d at 833; (2) "only 27 black lawyers live in Hamilton County." *Id.* From these facts, the Court of Appeals did "not agree that this factor clearly supports a finding of vote dilution under these circumstances." *Id.*

h. Responsiveness of Elected Officials to Minority Needs – The petitioners make no mention of the responsiveness of the trial court and general sessions court judges in Hamilton County to the needs of minorities. The District Court found and the Court of Appeals agreed that these judges "are responsive to the particularized needs of the black community in Hamilton County inasmuch as these judges are fair and impartial in the disposition of matters before them [and that] there is no proof that any of the present judges have discriminated against any African Americans who have been involved in the judicial process as plaintiffs, defendants, attorneys, jurors, or witnesses." *Cousin*, 904 F. Supp. at 711; *Cousin*, 145 F.3d at 833.

i. Tennessee's Interest in Maintaining At-Large Elections

The District Court and the Court of Appeals both found as a matter of law that the Tennessee's interest in a co-extensive electorate and jurisdiction of the trial courts and general sessions courts in Hamilton County is a "substantial interest". *Cousin*, 904 F. Supp. at 712; *Cousin*,

145 F.3d at 834. The District Court found this "substantial interest" insufficient to outweigh the other factors "because it is overcome by the substantial dilution of black voting strength that it produces in Hamilton County." *Cousin*, 904 F. Supp. at 712. On the other hand, Court of Appeals concluded that the Senate factors including the linkage interest weigh against a finding of vote dilution under § 2. *Cousin*, 145 F.3d at 834.

REASONS WHY THE PETITION SHOULD BE DENIED

1. The Court Of Appeals' Analysis Of The *Gingles'* Third Pre-Condition Does Not Conflict With The Decisions Of Other Circuits.

The petitioners entirely misconstrue the Court of Appeals' analysis of the *Gingles* third pre-condition as being in conflict with other circuits. The petitioners begin their argument with the misstatement that "[i]n concluding that candidates favored by blacks were not usually defeated by whites voting as a bloc, the court of appeals relied primarily upon the analysis of defendants' expert, Dr. Delbert Taebel." Petition for Writ of Certiorari, p. 22. In fact, the Court of Appeals relied upon the data of both the petitioners' expert and the respondents' expert in concluding that the District Court erred in holding that the petitioners had met the *Gingles* third pre-condition. Specifically, the Court of Appeals stated the following:

> We conclude that the district court's slavish adoption[6] of Dr. Cole's analysis to support a finding that the plaintiffs met the third Gingles pre-condition was error. We reach this conclusion not merely because we disagree with Dr. Cole's methodology, but also because we find Dr. Taebel's study more relevant, and because Dr. Cole's data belie his conclusions. While Dr. Cole testified that, in his opinion, elections pitting two white candidates against each other offered little information for a racial bloc voting analysis, we, like Dr. Taebel, agree with the Eleventh Circuit that such elections do offer relevant information in this inquiry.

Cousin, 145 F.3d at 825.

The respondents do not disagree that the most probative elections for purposes of analyzing the third *Gingles* pre-condition would be elections for trial court judge and general sessions court judge in Hamilton County involving black and white candidates. The problem in this case is that there are no such elections to analyze. The question then becomes which elections should be analyzed and in what order. The petitioners' expert only analyzed black/white elections for any offices in Hamilton County and the City of Chattanooga beginning in the 1960s to the present. The respondents' expert, on the other hand, analyzed elections for trial court judge, general sessions court judge, state supreme court judge, juvenile court

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[6] The Court of Appeals' reference to "slavish adoption" is to the fact that the District Court simply quoted at length from the testimony of the petitioners' expert with no substantive analysis of the third pre-condition. *Cousin*, 904 F. Supp. at 692-700.

judge, district attorney general, and public defender in Hamilton County, which with one exception involved only white candidates, along with county-wide elections for other offices.

In determining which elections to consider in judicial Voting Rights Act cases, other circuits have held that: (1) "Lumping together all elections, judicial and nonjudicial alike creates a risk of glossing over the significant differences between the legislative and judicial arenas." *SCLC v. Sessions*, 56 F.3d 1281, 1293 (11th Cir. 1995) (*en banc*). *See also Magnolia Bar Association v. Lee*, 994 F.2d 1143, 1149 (5th Cir. 1993) ("Elections involving the particular office at issue will be more relevant than elections involving other offices."); (2) "Although evidence drawn from elections involving black candidates is more probative in Section Two cases, an analysis of split-preference elections is also appropriate and relevant." *Davis v. Chiles*, 139 F.3d 1414, 1418, n. 5 (11th Cir. 1998).

If one looks at the universe of elections considered by the District Court and the Court of Appeals in this case, three categories appear: (1) "lawyer-qualified" elections with black/white candidates; (2) county-wide judicial partisan elections with white/white candidates; and (3) all other elections involving black/white candidates. Contrary to the assertions of the petitioners, the Court of Appeals did not rely solely upon category two in its analysis. In fact, the Court of Appeals used the data of the petitioners' expert to refute the conclusion that the third pre-condition had been met:

> A close look at Dr. Cole's data confirms that, even in the universe of elections he analyzed,

> this result [the white voting bloc usually defeating the black-preferred candidate] does not usually occur. Black candidates won two of Dr. Cole's five black/white judicial elections, an especially impressive success rate when one considers that Timberlake, the losing black candidate in two of the three elections won by whites, was not qualified to hold the office since he was not a lawyer. In addition, blacks won 9 of Dr. Cole's 29 non-judicial black/white elections. In four of those elections – the 1974 Democratic Primary for House District 28, the 1984 Democratic Presidential Primary, the 1990 runoff election for City Council District 7, and the 1990 general election for School Board District 7 – the black candidate prevailed despite unanimous or near-unanimous white cohesion.

Cousin, 145 F.3d at 825. Thus, the Court of Appeals properly considered not only the white/white elections for the judicial offices as analyzed by the respondents' expert but also properly considered the black/white elections for other judicial offices in reaching its conclusion that the District Court erred in its holding that the third precondition had been met.[7]

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[7] The black-preferred candidate won three of the five black/white judicial contests analyzed by the petitioners' expert because Timberlake, the black candidate, was not the candidate preferred by a majority of black voters in the 1982 city judge election in the City of Chattanooga. In fact, there were a total of 7 elections involving black/white candidates for "lawyer-qualified" offices if two public defender elections in 1990, primary election and general election, are included. Of those 7 elections, the black-preferred candidate prevailed 5 times. Trial Exhibit 313. The respondents argued at trial that the "lawyer-qualified" elections involving black/white candidates

2. The Court Of Appeals' Analysis Of The Totality Of The Circumstances With The State Linkage Interest Does Not Conflict With Decisions Of This Court Or Of Any Other Circuits.

In *Houston Lawyers' Association v. Attorney General of Texas*, 501 U.S. 419, 426, 111 S. Ct. 2376, 2381, 115 L. Ed. 2d 379 (1991), this Court stated that "the State's interest in maintaining an electoral system – in this case Texas' interest in maintaining the link between a district judge's jurisdiction in the area of residency of his or her voters – is a legitimate factor to be considered by the courts among the totality of the circumstances in determining whether a Section 2 violation has occurred." Thus, in Voting Rights Act cases involving the election of a trial court judge from the same geographic area as that judge's jurisdiction, this Court has added an additional factor to consider under the totality of the circumstances test.

The Fifth Circuit has interpreted this factor as being substantial in nature – requiring more proof of vote dilution as to the other factors in order to establish a § 2 violation – and considers the state "linkage" interest to be

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were more relevant than all other black/white elections because white voters in Hamilton County have as a matter of fact behaved significantly differently when a black lawyer ran for a "lawyer-qualified" public office as opposed to other black candidates. The white voter cross-over was 34% in these "lawyer-qualified" offices as opposed to 8.5% in all other elections involving black/white candidates. The fact that the black-preferred candidate prevailed 5 of 7 times in such elections supports the conclusion of the Court of Appeals that the District Court erred in its holding that the petitioners had met the third pre-condition.

substantial as a matter of law. On remand from this Court, the Fifth Circuit in *League of United Latin American Citizens Council, Inc. v. Clements*, 999 F.2d 831 (5th Cir. 1993) (*en banc*), *cert. denied*, 501 U.S. 419, 114 S. Ct. 878, 115 L. Ed. 2d 379 (1994) (*LULAC*), determined that Texas' linkage interest was compelling as a matter of law based upon this Court's decision in *Gregory v. Ashcroft*, 501 U.S. 452, 466, 111 S. Ct. 2395, 115 L. Ed. 2d 410 (1991) which held that the Age Discrimination Employment Act does not apply to state court judges in Missouri. In particular, the Fifth Circuit noted that, if according to this Court "the authority of the people of the states to determine the qualifications of their most important government officials. . . . lies at the heart of representative government," then "the people of Texas have at least a substantial interest in defining the structure and qualifications of their judiciary." *LULAC*, 999 F.2d at 873

The Court of Appeals in its earlier *Cousin* decision in 1995 agreed with the Fifth Circuit's analysis "to the extent that it concluded Texas had a substantial interest in linking trial judges' electorate to their jurisdiction, and concluded that, because Tennessee has no less legitimate an interest in its method of electing judges, the district court erred as a matter of law when it found Tennessee's interest in electing with a jurisdiction co-extensive with their electorate was 'nebulous at best.' " *Cousin*, 46 F.3d at 577. The petitioners argue that the respondents should be required to and failed to prove that Tennessee's linkage interest was substantial. Petition for Writ of Certiorari, pp. 17-18. To the contrary, this Court in *Houston Lawyers'* stated that the linkage interest is "a legitimate factor to be

considered by courts among the 'totality of circumstances' in determining whether a Section 2 violation has occurred". *Houston Lawyers'*, 501 U.S. at 426-27, 111 S. Ct. at 2380-81.[8]

Once the linkage interest was established as a "substantial" one by the Court of Appeals, then that interest was considered with all of the other Senate factors. The Court of Appeals noted this Court's point in *Houston Lawyers'* that the linkage interest "is merely one factor to

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[8] The petitioners argue that there is proof in the record that Tennessee's linkage interest is not as strong as asserted by the Court of Appeals. Specifically, the petitioners state that the Court of Appeals "ignores both the law and practice in Tennessee" noting that judges "may exercise judicial power totally 'unlinked' to the jurisdiction . . . [and that] in actual practice, [j]udges who testified at trial said they routinely served outside the areas in which they were elected." Petition for Writ of Certiorari, p. 17. To the contrary, the record reflects for example that the circuit court in Hamilton County cannot hear criminal cases. Tr., p. 129 (November 9, 1993). Furthermore, there is "not too much interchange" between circuit court and criminal court judges, and interchange between circuit court judges and chancellors is extremely "rare". *Id.*, p. 132. In those instances where a judge from Hamilton County travels to a different county to hear the case, the reason for such a circumstance is that the judges of the other county have recused themselves from the case requiring a judge from outside the jurisdiction to hear the case. Tr., pp. 132-33 (November 10, 1993). In order to provide a fair and impartial judge, there may be instances when a judge, who was not elected by the jurisdiction in which the case is heard, may have to hear a case as a result of recusal of local judges. This does not lessen the substantiality of the state's linkage interest, but merely deals with how to administer justice in recusal situations.

be considered in evaluating the 'totality of the circumstances,' [and] that interest does not automatically, and in every case, outweigh proof of racial vote dilution." *Cousin*, 46 F.3d at 575, *quoting Houston Lawyers'*, 501 U.S. 426-17, 111 S. Ct. 2380-81. The Court of Appeals then correctly weighed all of the Senate factors and concluded that there was no violation of § 2 under the "totality of the circumstances":

> We find that the district court's application of the totality of the circumstances test was clearly erroneous. We consider only the effects of past discrimination on blacks' political participation, the fifth 'typical' Senate factor, to cut clearly in favor of a finding of vote dilution. However, this one factor, in combination with the others, does not outweigh the significant linkage interest Tennessee has in electing the offices at issue here on an at-large basis. Therefore, even if we had considered the plaintiffs' showing sufficient to meet the three Gingles pre-conditions, we would not have found a Section 2 violation under the totality of the circumstances.

Cousin, 145 F.3d at 834.

Looking at the facts of this case, it is at best a "marginal" case for establishing vote dilution under the "totality of the circumstances". Voting is polarized in judicial elections; however, black lawyers have had success in winning such offices as city judge and county public defender. There has been no official discrimination in voting practices since the early part of this century, but blacks still suffer from a depressed socioeconomic status in the community making it more difficult for them to run for public and in particular judicial office. There is no

candidate slating process, and there was no finding by the District Court of overt or subtle racial appeals in campaigns. Finally, the present trial court judges and general sessions court judges have been responsive to the needs of blacks in Hamilton County by being fair and impartial to all citizens with no proof of discrimination against blacks as plaintiffs, defendants, attorneys, jurors or witnesses. When Tennessee's "substantial" linkage interest is added to these factors for consideration, it is clear that the Court of Appeals' decision was correct and is not in conflict with decisions of this Court or the Fifth Circuit concerning how to conduct the "totality of circumstances" analysis, as modified by this Court for judicial elections in *Houston Lawyers'*.

3. The Court Of Appeals' Decision Regarding The Legal Validity Of Single-Member District Or Cumulative Voting As A Remedy For A Section 2 Violation In A Judicial Election Does Not Merit Plenary Review By This Court.

The petitioners begin their Petition for Writ of Certiorari with the argument that "[t]he decision of the court of appeals that no remedy is available for a Section 2 violation in the context of judicial elections is nothing less than repeal of a critical and important provision of the Voting Rights Act, and is directly contrary to *Houston Lawyers'*. . . . " Petition for Writ of Certiorari, p. 14. Of course, this Court need not consider plenary review of the remedy in this case unless it grants certiorari on the liability issues, *i.e.*, the *Gingles* pre-conditions and the "totality of the circumstances" test. Furthermore, the question of the legal validity of subdistricts as a remedy

as considered by the Court of Appeals is pure dicta inasmuch as the District Court adopted cumulative voting and not subdistricts as the remedy.[9] In any event, the thrust of the petitioners' argument as to both single-member districts and cumulative voting is that the Court of Appeals erroneously held that the state's linkage interest "automatically" precludes any remedy from being imposed "even where there is a finding of vote dilution." Petition for Writ of Certiorari, pp. 14-16.

It should be emphasized that the Court of Appeals in determining liability under § 2 included the state's linkage interest as a factor in the "totality of circumstances" test in determining that there was no vote dilution. *Cousin*, 145 F.3d at 834. However, the Court of Appeals then did consider whether, even if the petitioners had met all the requirements for establishing a § 2 claim, the state's linkage interest would preclude the remedy of cumulative voting adopted by the District Court and the remedy of single member districts proposed by the petitioners.

Relying upon the Eleventh Circuit decision in *Nipper v. Smith*, 39 F.3d 1494, 1542 (11th Cir. 1994), the Court of Appeals concluded that both subdistricts and cumulative voting as remedies would be inappropriate in light of the state's linkage interest. *Cousin*, 145 F.3d at 828-30. In *Nipper*, the Eleventh Circuit, which has approached the

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[9] The Court of Appeals stated that "[e]ven if [it] had held plaintiffs' vote dilution claim valid, [it] would not have affirmed a remedy such as [the petitioners] proposed in this case because it is at odds with the important state interest in 'linkage.' " *Cousin*, 145 F.3d at 827.

"state interest" differently than the Fifth Circuit, held that the state's linkage interest "is of little, if any relevance in the totality of the circumstances test",[10] but that the linkage interest "plays a major role in consideration of the remedies the appellants propose as alternatives [and that] none of the alternatives constitutes an objectively reasonable and workable solution to the vote dilution in the present case." *Nipper*, 39 F.3d at 1542. *See also Davis v. Chiles*, 139 F.3d at 1424 . After rejecting subdistricts as an acceptable remedy, *Nipper*, 39 F.3d at 1544, the Eleventh Circuit also rejected cumulative voting as a legally acceptable remedy:

> Although cumulative voting would preserve linkage and avoid many of the concerns accompanying a subdistricting plan, such a scheme would create problems of its own. The traditional corporate cumulative voting method, or a modification thereof, would be workable if Florida's numbered post system were maintained. Requiring judges to run for unnumbered seats on the court, meaning that all of the judges seeking reelection would be forced to oppose each other, would have a detrimental effect on the collegiality of the court's judges in administrative matters.

Id.

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[10] The basis for the Eleventh Circuit's view is that the "linkage interest neither establishes nor rebuts the existence of racial bias in the voting community." *Nipper*, 39 F.3d at 1542. This approach is obviously inconsistent with this Court's instructions in *Houston Lawyers'* to weigh the state linkage interest with the other Senate factors in determining liability under § 2.

The Sixth Circuit in this case agreed with the Eleventh Circuit noting that "forcing these judges to oppose each other would, to a substantial degree, deny them the full appreciation of the benefits of their incumbency, increasing the possibility that the election would unseat some of the hardest-working and most efficient judges in the state of Tennessee. See Annual Report of the Tennessee Judiciary, 1996-97 (indicating that Hamilton County Circuit and Chancery Court judges shoulder among the highest workloads in Tennessee in terms of filings and dispositions per judge.)" *Cousin*, 145 F.3d at 830.

Although the Court of Appeals' discussion of the preclusive effect of the state's linkage interest of a single-member district remedy is inconsistent with this Court's analysis in *Houston Lawyers'*, that discussion is nothing more than dicta in that the single-member district remedy was not even adopted by the District Court. Thus, such an issue does not merit plenary review by this Court. As for the Court of Appeals' holding that cumulative voting as a remedy would be precluded by the state linkage interest, this Court need not grant plenary review of that issue because the underlying liability issues of the *Gingles* third pre-condition and the "totality of the circumstances" test do not merit a grant of certiorari in this case.

CONCLUSION

The petitioners have failed to provide any reasons for this Court to grant plenary review of this case. No decisions of other federal circuit courts or this Court conflict with the decisions of the Sixth Circuit. Accordingly, the petition for writ of certiorari should be denied.

Respectfully submitted,

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No. 98-598

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In The

Supreme Court of the United States

October Term, 1998

MAXINE B. COUSIN, LORENZO E. ERVIN, JR., EZRA B. HARRIS, JOHNNY D. HOLLOWAY, GEORGE A. KEY, SR., BUFORD MCELRATH, ANNIE D. THOMAS, BOBBY WARD, and ELLA BRYANT,

Petitioners,

v.

DON SUNDQUIST, Governor of Tennessee; STATE ELECTION COMMISSION; BROOK THOMPSON, Coordinator of Elections; HAMILTON COUNTY ELECTION COMMISSION; and CAROLYN JACKSON, Superintendent of Elections of Hamilton County,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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ARGUMENT

I. The Court of Appeals' Racial Bloc Voting Analysis Was Flawed

Respondents dispute petitioners' statement that "the court of appeals relied primarily upon the analysis of defendants' expert, Dr. Delbert Taebel," in concluding that racially polarized voting was not legally significant within the meaning of *Thornburg v. Gingles*, 478 U.S. 30, 51 (1986). Brief in Opposition to Petition for Writ of Certiorari, p. 12 (hereinafter Brief in Opposition). To the contrary, the court of appeals said unambiguously that "we find Dr. Taebel's study more relevant" than the study of petitioners' expert Dr. Cole, App. 13, and that "Dr. Taebel's analysis shows that minority-preferred candidates can and do win county-wide elections in Hamilton County." App. 18. It bears repeating that Dr. Taebel's analysis: (1) included only one election involving a black candidate;[1] (2) excluded all primary elections; and, (3) excluded all the black/white judicial elections.

To the extent that the court of appeals *did* consider the black/white elections analyzed by Dr. Cole, it merely compounded the error of its highly selective, white/white election approach. It erroneously inflated the level of white support for black candidates in municipal and state judicial elections, *see* Petition for Writ of Certiorari,

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[1] In their Brief in Opposition, p. 8, respondents say that "[o]nly one election analyzed by the petitioners' expert involved a black and white candidate." This is obviously a typographical error, since there is no dispute that this is a description of the analysis done by respondents' expert.

p. 27,[2] and held that the success of black candidates in majority black state house, city council, and school board districts refuted Dr. Cole's conclusion that white bloc voting was significant. App. 15 ("these examples of black candidates' success . . . show that Dr. Cole's conclusion – that black candidates in Hamilton County will usually lose for lack of sufficient white crossover support – is not borne out even by his own data"). The fact that black candidates have won in majority black districts does not disprove, logically or legally, that blacks will usually lose countywide, where blacks are only 17% of the voting age population. App. 43. These black electoral successes show, rather, that majority black districts have been an effective remedy for minority vote dilution, *see Brown v. Board of Commissioners of Chattanooga, Tenn.*, 722 F.Supp. 380 (E.D.Tenn. 1989) (invalidating at-large elections in Chattanooga on vote dilution grounds), and have provided black voters an equal opportunity to elect candidates of their choice.[3]

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[2] Respondents have not contested these errors of the court of appeals.

[3] Respondents suggest, Brief in Opposition, p. 15 n.7, that the racial bloc voting analysis in this case should be limited to the municipal judicial elections (including the contest in which the black candidate – Timberlake – was ineligible to hold office and was by definition not a serious candidate), and the only countywide position (public defender) ever won by a black. Adopting such a selective approach, aside from being entirely self-serving, and aside from the fact that blacks are a greater percent of the municipal population than the county population (34% versus 19%), would preclude a court from making a determination about how voters "usually" voted within the meaning of Thornburg v. Gingles, 478 U.S. at 51.

II. There Is Substantial Evidence of Recent Discrimination in Hamilton County

Respondents contend that the district court, in its totality of circumstances analysis, made no findings of discrimination beyond the year 1911. Brief in Opposition, p. 9. Their contention is in error.

First, respondents stipulated to ongoing discrimination in Hamilton County in virtually every aspect of life into the 1960s. Trial Exs. 371, paras. 105-80; 372, paras. 105-80. These stipulations, many of which were adopted verbatim by the district court, App. 86-92, included:

*"The Chattanooga city commission in the conduct of its business regularly enforced the laws and customs of racial segregation, *e.g.*, authorizing the establishment of a 'colored' orphanage in 1922." Trial Exs. 371, para. 108; 372, para. 108.

*A 1947 report of the National Urban League "documented the continuing existence of segregation in Chattanooga and the depressed socioeconomic conditions of blacks." Housing for blacks was "substandard." A majority of blacks "were in the lowest income brackets." Many black schools were "housed in places that ought to be condemned." Health care for blacks was "segregated" and "was generally inferior." Blacks were "excluded from membership on city boards and agency staff positions." *Id.*, para. 115.

*A black policeman "was suspended from the force in 1948 for arresting a white man in violation of department policy." *Id.*, para. 116.

*When Shepherd Hills, a Hamilton County subdivision, was developed in 1953, "lots were deeded subject to

covenants forbidding sale or rental 'to any Negro, mulatto, or other person of color . . . [or] to any person of Jewish or Hebrew blood.' " *Id.*, para. 119.

*"Musical events at the city auditorium in Chattanooga were customarily segregated on the basis of race. When a black took a seat in the 'whites only' section during a dance in 1956, a fight broke out." *Id.*, para. 121.

*"In 1957, after the Southern Coach Lines removed the segregated seating signs from its buses following a Supreme Court ruling that the segregation was unlawful, someone placed a dummy on the Walnut Street bridge on which was written 'All NAACP bus riding niggers.' " *Id.*, para. 122.

*"Two dynamite explosions were set off within one week in 1958 at the Phillis Wheatley Branch of the YWCA for Negroes. Hotels, train stations, drinking fountains, and city parks were all racially segregated." *Id.*, paras. 123, 124.

*"Blacks were not employed in administrative positions in Chattanooga city government until 1962." *Id.*, para. 136.

*The City of Chattanooga did not open all city operated facilities to blacks until 1963." *Id.*, para. 137.

*"The University of Chattanooga was operated on a racially segregated basis until 1965." *Id.*, para. 139.

*"Erlanger Hospital did not desegregate its facilities until the government threatened to cut off federal funds in 1966. When the hospital's board agreed to sign a certificate of compliance with the Civil Rights Act of 1964, the president of the board resigned in protest." *Id.*, para. 140.

*"Churches and ministerial alliances in Hamilton County are largely segregated." *Id.*, para. 148.

*Public housing in Chattanooga was "planned," "constructed," and "occupied, on a racially segregated basis." Most of the projects administered by the Chattanooga Housing Authority "remain racially segregated to the present time." *Id.*, para. 158.

*In the 1970s "the City of Chattanooga rezoned a parcel of land in the Hickory Valley Road area from multi-family to single family use at the request of local whites who were opposed to the construction of a federally assisted multi-family housing project on the land." In 1981, the city entered into a consent decree in a federal lawsuit brought by the NAACP "in which the city agreed not to interfere with the development and construction of public housing, and to purchase the Hickory Valley Road property and deed it to the developers for construction of multi-family housing units." *Id.*, paras. 162, 163.

*"[C]ity schools were completely segregated on the basis of race." "The administrative staff of the school system was all white. County teacher associations were segregated." *Id.*, paras. 173, 174.

*"During the desegregation of city schools there were racial incidents and confrontations throughout the late 1960s and early 1970s." *Id.*, para. 177.

*Despite court ordered desegregation "resegregation had occurred . . . [as] the result of a 'more subtle and lingering malaise of fear and bias in the private sector which persisted after curative action had been taken to eliminate the dual system itself.' " *Id.*, para. 178.

*"In 1988, 22 of the 52 schools in the city system were racially identifiable (90% or more of one race)." *Id.*, para. 180.

Plainly, there is no basis for respondents' assertion that there was no finding of discrimination beyond the year 1911.

III. Other Gingles Factors

A. The Extent to Which Blacks Have Been Elected to Office

Respondents contend that the lack of black candidates for county judgeship and the fact that there are relatively few black lawyers in Hamilton County undercut a finding of vote dilution. Brief in Opposition, p. 11. First, given the frequency with which blacks have run for other offices, the fact that no black has run for a county judgeship is strong and direct evidence that the at-large system is discriminatory. *See, e.g., McMillan v. Escambia County*, 748 F.2d 1037, 1045 (11th Cir. 1984) ("the lack of black candidates is a likely result of a racially discriminatory system").

The Court in *Thornburg v. Gingles*, 478 U.S. at 57 n.25, recognized that there would be situations "[w]here a minority group has never been able to sponsor a candidate." That does not mean minority voting strength is not diluted, but only that "courts must rely on other factors that tend to prove unequal access to the electoral process." *Id.*

Second, this is not an employment discrimination case by black lawyers in which an "applicant pool" analysis might be appropriate. The rights at issue are those of minority voters. Third, to permit a defense based on the comparative number of black attorneys would reward the state for its history of discrimination, including its exclusion of blacks from universities and law school. *See Gray*

v. University of Tennessee, 97 F.Supp. 463 (E.D.Tenn. 1951); *Sanders v. Ellington*, 288 F.Supp. 937, 940 (M.D.Tenn. 1968) ("some six years elapsed [after the *Brown* decision in 1954] before racial requirements for admission [to state universities] were formally abolished").

B. Responsiveness

Respondents correctly note that petitioners "make no mention of the responsiveness" of county judges to the needs of minorities. Brief in Opposition, p. 11. That is because proof of unresponsiveness is not a "requisite element" of a plaintiff's case under Section 2 of the Voting Rights Act, 42 U.S.C. § 1973. S.Rep. No. 417, 97th Cong., 2d Sess. 29 n.116 (1982). Moreover, as the Senate report makes clear, "defendants' proof of some responsiveness would not negate plaintiff's showing by other, more objective factors" of vote dilution. *Id.*[4]

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[4] While petitioners did not make unresponsiveness an issue, the record contains examples of the judges' lack of responsiveness to the black community. For example, the nine trial judges appoint the county jury commissioners, but the judges have never appointed a black to the commission. Meyer, T. Vol. III, p. 139. During the 1960s, criminal defendants in the county filed motions to dismiss their indictments on the ground that no black had ever been appointed foreperson of the grand jury. After the challenges, the criminal court judges appointed for the first time a black and a woman as forepersons. *Id.*, pp. 137-38. The chancellors appoint a member to the Hamilton County Hospital Authority, but they have never appointed a black. Peoples, T. Vol. III, pp. 118-19.

IV. Linkage Is not Observed in Practice

Respondents contend that petitioners are wrong in claiming that "judges who testified at trial said they routinely served outside the areas in which they were elected." Brief in Opposition, p. 18, n.8. That *is* what the judges said, and there is nothing in the testimony cited by respondents that contradicts it. Respondents point out that one of the judges testified that "the circuit court in Hamilton County cannot hear criminal cases." *Id.* That may well be a correct statement of the *jurisdiction* of the circuit court, but it says nothing whatever about judges elected in Hamilton County hearing cases outside of Hamilton County. Similarly, the fact that there is "some" but "not too much" interchange by judges of the various courts *within* Hamilton County, says nothing about linkage or the practice of judges elected in one county hearing cases in another county.[5]

The judges testified without contradiction that prior to 1990 the state Administrator of the Courts "encouraged" judges to freely exchange," or serve in other circuits. Meyer, T. Vol. III, 139-40. *See also* Peoples, T. Vol. III, 114 ("the Chief Justice designated me" to sit in cases outside Hamilton County). One judge testified that "actually I have a goal, I want to sit in all 95 counties in the state." Meyer, T. Vol. III, 140-41. Exchange is not encouraged as much today, but solely because of concern over

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[5] Respondents' discussion, Brief in Opposition, p. 18 n. 8, of the testimony of Judge Barker, T. Vol. II, 132, is misleading. Here is the exchange that occurred: "Q. Is there any interchange among the judges within the circuit court? A. Some, not too much, but some, yes, sir." *Id.* It is apparent that the judge was not testifying about linkage, but only the frequency with which judges served on the various courts within the county.

the added expense involved. *Id.*, p. 141 ("Q. It doesn't have anything to do with any other consideration – A. No. Q. – Except saving money? A. No. Financial.").

V. Office Holders Have no Right to a System that Maximizes the Advantages of Incumbency

Respondents quote the court of appeals with approval that a system of cumulative voting

> forcing these judges to oppose each other would, to a substantial degree, deny them the full appreciation of the benefits of their incumbency, increasing the possibility that the election would unseat some of the hardest-working and most efficient judges in the state.

Brief in Opposition, p. 23. No court, to petitioners' knowledge, has ever held that office holders have a right or entitlement to a system that guarantees them "the full appreciation of the benefits of their incumbency."[6] Under our democratic system, elected office belongs to the voters, not the incumbents. *Reynolds v. Sims*, 377 U.S. 533, 585 (1964) ("it would be an unusual case in which a court would be justified in not taking appropriate action to

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[6] Far from recognizing a right to office holding, let alone to the "benefits" of incumbency, lower federal courts have routinely required special elections or shortened the terms of officials elected under illegal systems. *See, e.g.*, Wallace v. House, 377 F.Supp. 1192, 1201 (W.D.La. 1974); Taylor v. Monroe County Board of Supervisors, 421 F.2d 1038 (5th Cir. 1970); Watkins v. Mabus, 771 F.Supp. 789 (S.D.Miss. 1991). This Court, of course, has recognized the appropriateness of setting aside elections to cure voting rights violations. NAACP v. Hampton County Election Com'n, 470 U.S. 166, 182-83 (1985); Clark v. Roemer, 500 U.S. 646, 659-60 (1991).

insure that no further elections are conducted under the invalid plan").

In addition, there is no reason to suppose that judges elected under a racially fair system of elections would not be hard working and efficient. To conclude otherwise would be to indulge in crude racial stereotyping.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

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